DOCUMENT RESUME

ED 467 226 EA 031 801

TITLE	Privacy Rights in the 21st Century. Seminar Outlines [of the] Education Law Association Winter Seminar (Lake Tahoe, Nevada, March 21-24, 2002).
INSTITUTION	Education Law Association, Dayton, OH.
PUB DATE	2002-03-00
NOTE	132p.
AVAILABLE FROM	Education Law Association, 300 College Park, Dayton, OH 45469 ($30). Tel: 937-229-3589; Fax: 937-229-3845; Web site: http://www.educationlaw.org.
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Civil Law; Civil Liberties; Disclosure; Elementary Secondary Education; Freedom of Information; *Privacy; *School Law; Seminars; *Student Rights

ABSTRACT

This collection of eight seminar outlines focuses on current privacy-rights issues in the arena of education. Seminar outlines include: (1) "The Transparency of Public School Employees' Professional and Personal Lives in the 21st Century: A Canadian Perspective," by Sam Carmen and Val Riewe; (2) "Common Law Privacy in Educational Settings," by David Dagley and Lisa Stamps; (3) "The Internet and Academic Freedom: The Implications of Urofsky v. Gilmore," by Luke M. Cornelius; (4) "Students' Rights of Privacy in the Digital Age," by Philip T.K. Daniel and Patrick Pauken; (5) "Disability, Privacy, and Protection: Ruminations on Maintaining Dignity in Public Spaces," by Theresa Glennon; (6) "FERPA, IDEA and Student Discipline: Navigating the 'Shark-Infested Waters'," by John Decman and Cassandra Bauer; (7) "The Korean Supreme Court Viewpoint of Professor-Assistant Sexual Harassment," by Heekwon Sohn; and (8) "Discriminatory Surveillance: Issues of Equity, Privacy and Security in Schools," by Ron Garrison. (RT)

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Privacy Rights in the 21st Century

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Winter Seminar 2002

March 21-24, 2002
Hyatt Regency
Lake Tahoe, Nevada

Education Law Association
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Education Law Association - 2002 Winter Seminar
Hyatt Regency, Lake Tahoe, Nevada
March 21 – 24, 2002

PRIVACY RIGHTS IN THE 21ST CENTURY

Seminar Outlines

Table of Contents

THE TRANSPARENCY OF PUBLIC SCHOOL EMPLOYEE'S PROFESSIONAL AND PERSONAL LIVES IN THE 21ST CENTURY: A CANADIAN PERSPECTIVE
SAM CARMEN
VAL RIEWE

COMMON LAW PRIVACY IN EDUCATIONAL SETTINGS
DAVID DAGLEY
LISA STAMPS

THE INTERNET AND ACADEMIC FREEDOM:
THE IMPLICATIONS OF *UROFSKY V. GILMORE*
LUKE M. CORNELIUS

STUDENT'S RIGHT OF PRIVACY IN THE DIGITAL AGE
PHILIP T.K. DANIEL
PATRICK PAUKEN

DISABILITY, PRIVACY, AND PROTECTION:
RUMINATIONS ON MAINTAINING DIGNITY IN PUBLIC SPACES
THERESA GLENNON

FERPA, IDEA AND STUDENT DISCIPLINE:
NAVIGATING THE "SHARK-INFESTED WATERS"
JOHN DECMAN
CASSANDRA BAUER

THE KOREAN SUPREME COURT VIEWPOINT OF PROFESSOR-ASSISTANT SEXUAL HARRASSMENT
HEEKWON SOHN

DISCRIMINATORY SURVEILLANCE:
ISSUES OF EQUITY, PRIVACY AND SECURITY IN SCHOOLS
RON GARRISON

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PRIVACY RIGHTS IN THE 21ST CENTURY

The Transparency of Public School Employees' Professional and Personal Lives in the 21st Century: A Canadian Perspective

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Hyatt Regency Lake Tahoe
March 21-24, 2002

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The Transparency of Public School Employees' Professional and Personal Lives in the 21st Century: A Canadian Perspective

I might have been a goldfish in a glass bowl for all the privacy I got.
Saki: *The Innocence of Reginald*

Introduction

The public possesses a strong interest in viewing criminal records; records of arrests and convictions are made widely available to ensure the public's right to information about government policies and actions. The public also has an interest in knowing what types of people are working in public schools. The intersection of these rights and the potential to impact a public employee's ability to maintain or gain future employment are part of a "balancing test" To what extent does a conviction impact on the employee's performance? How do contract arbitrations and agreements expunge impact the public right–to-know? How do we resolve the notion of prior restraint and the First Amendment freedoms versus the competing interest implicated by potential public disclosure of such records? The presentation will examine case law and legislative history with an analysis of the impact of collective bargaining relationships and contract provisions.

Tension arises between the public's right to know and the public employee's right to privacy. It is never easy to balance individual rights and freedoms with the need to protect (and be seen to protect) the interests of an employer and the public they serve. The individual's right to privacy or the right to be protected against unwanted publicity often runs headlong into the public's "right to know".[1] As in the United States, Canada continues to wrestle with the questions of: When should the individual's interests give way to those of society? When should societal rights be subordinated to those of the individual?

Privacy relates to the right of the individual to control his or her own personal information. Questions arise as to whether, and under what conditions, a person can be compelled by law to disclose his or her personal information to others and whether a person can prevent the disclosure of his or her personal information by anyone holding that information. The law does not usually determine what privacy is, but those situations where an individual's privacy interest will be afforded legal protection.

Mr Justice La Forest of the Supreme Court of Canada described the importance of privacy as:

[1] Foster, William F, editor. CAPSLE 1994; Rights, Responsibilities, and Reasonableness. Eric Roher, "Privacy, Confidentiality and Privilege in a School Context" Quebec. Lisbro Inc, p 411.

> Society has come to realize that privacy is at the heart of liberty in a modern state…grounded in man's physical and mortal autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state[2].

Balance of rights of the individual and society

There are no absolute rights in privacy legislation. Rather paramount or precedent rights determine the balance between these two. The distinction between absolute rights and paramount rights is analogous to the security of society versus the security of a person. Privacy legislation at the federal level and in most Canadian provinces attempts to control the disclosure to third parties of personal information gathered and held by government bodies. The Supreme Court of Canada has pursued both a broad and a focused approach in dealing with the protection of privacy.[3] British Columbia, Manitoba, Newfoundland, Saskatchewan and Quebec have Privacy Acts. Canadian law affecting the workplace, particularly the unionized workplace, such as teacher organizations, recognizes and protects privacy interests in certain circumstances. The tort of invasion of privacy has resulted in some cases before the courts where defendants succeed in approximately three of four cases.

In other areas, Canadian law has focused on personal information protections. The *Personal Information Protection and Electronic Documents Act,*[4] focuses on controlling the collection, use, and disclosure of information. Currently this Act applies to organizations that are within the legislative authority of the Parliament of Canada, and requires the organization identify the purposes of collection to the individual at the time of collection. Individuals must be notified, when required, of the existence, use and disclosure of personal information. As well the individual must have access to and may correct personal information held about him/her. Retention and destruction of personal information guidelines must be established.

On September 1, 1998 public bodies such as school boards and charter schools in Alberta came under the *Freedom of Information and Protection of Privacy Act* (FOIP) which was passed in 1994. Note the fpase in. In the school context privacy issues for public employees arise when an employee is asked to provide his criminal record, a child welfare record check, or take a medical examination prior to or during employment or disclose medical records to the school board employer.

The Quebec Charter of Human Rights and Freedoms protects privacy as a 'fundamental human right' and Section 7 of the *Canadian Charter of Rights and Freedoms* can be invoked to protect privacy interests in appropriate cases. Still, disclosure of private information that is relevant and material to issues in dispute may be compelled during judicial proceedings.

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[2] R v Dyment, 1988, pp 427-428.
[3] McNairn, Colin H. H. & Alexander K Scott. Privacy Law in Canada. 2001, p 2.
[4] Supreme Court 2000, c 5.

Natural Justice (Due process)

The concept of fairness, often referred to as procedural fairness, is not a separate standard from the rules of natural justice, but is the heart of natural justice. Where a board or decision maker acts in an "administrative" capacity, there exists an obligation to act fairly, which is something less than the formal procedures referenced to the traditional natural justice. Gall references two Supreme Court of Canada rulings (*Nicholson v Haldimand-Norfold (Regional Municipality) Commissions of Police* and *Martineau v Matsqui Institutions)* that found the doctrine of fairness applicable not only to judicial and quasi-judicial decisions, but also to administrative decisions[5].

> In general it means a duty to observe rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative.[6]

McCurdy defines Natural Justice in the following manner:

> Natural justice comprises the rules to be followed by any person or body charged with the duty of adjudicating upon disputes between and upon the rights of others. The chief rules are to act fairly, in good faith, without bias and in a judicial temper and to give each party an opportunity to adequately state his case.[7]

The two basic premises of natural justice are that:
(a) An opportunity for a fair hearing should be given to those affected by a decision, and
(b) The decision maker should not be biased.

In respect of a fair hearing, Anderson offers the following basic rights as prepared by the Ontario Attorney General:
(a) The right to reasonable notice of time and place of the hearing.
(b) The right to reasonable information of any allegation respecting the good character, propriety of conduct and competence of a party of such matters are in issue.
(c) Right to a public hearing unless public security and intimate financial or personal matters are involved.
(d) The right to be represented by a lawyer or an agent
(e) The right to call and examine witnesses and to cross-examine other witnesses
(f) The right to protection against self-incrimination respecting the use of evidence in any subsequent civil or criminal proceedings (as far as the province can grant that right.
(g) The right to reasonable adjournments of a hearing
(h) The right to a written decision, with reason upon request.[8]

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[5] Gall, G L *The Canadian Legal System.* 1995, p 445.
[6] Ibid p 445.
[7] McMurdy, Sherburne. *The Legal Status of the Canadian Teacher. 1968, p 4.*
[8] Anderson, Judith in *The Canadian School Executive, Vol 1 No 2, 1981. "Legal Issues in Education in the Eighties"*, pp 10-11.

These same fundamental principles of due process protection are also essential elements in the investigation and possible subsequent hearing in cases of unprofessional conduct against a teacher.

Although Section 1 of the *Canadian Charter of Rights and Freedoms* notes that limits must be "reasonably justified in a free and democratic society," it is up to the government body imposing limits, in this case the school board, to demonstrate that the limits are reasonable. It is not up to the individual employee to demonstrate the unreasonableness.

> 7. Everyone has the right to life, liberty and the security of the person and the right to not be deprived thereof except in accordance with the principles of fundamental justice.
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> --*Canadian Charter of Rights and Freedoms*

Section 7 of the Charter invokes the principles of fundamental justice which is even more stringent caution than the natural justice/due process principles. Section 8 of the Charter provides that reason must exist before a search (an invasion of privacy) can be conducted. There must be some information to warrant it on an individual basis. In the absence of evidence related to the individual to merit a search, it is an unreasonable request.[9] It is true that such rights will impact unevenly.

The public employee

Charter rights are purposive rights--they extend to the point necessary to meet their purpose--which, it can be argued, is to prevent individuals from unwarranted invasions of privacy. In Alberta teachers in recent years have had to protect their privacy in several distinct arenas..

For example, the blanket requirement to have a post hiring *security clearance referral form* completed, including criminal records check for everyone, with or without finger printing, is unreasonable. In 1998 and 1999, several Alberta school districts attempted to impose this requirement. Teachers were advised that they must protest this imposition and if necessary their Association would have it reviewed by the courts. Teachers in those districts were advised "No teacher currently on contract should submit a completed form. School districts were informed

- that teachers under contract are not subject to probationary assessment for suitability. The *after the fact* determination of suitability is an unacceptable infringement of employment and privacy rights.
- The invasion of privacy and derogation of the teachers' rights in the required form far exceeds the minimum necessary to permit the safe operation of schools
- The requirement is a serious violation of teachers' Charter rights.
- Expectations for teachers are indicated in the teacher supervision policies. This requirement constitutes an arbitrary change that is unrelated to teaching.

The ATA prevailed.

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[9] Calvin Fraser unpublished article.

At the same time, circumstances for *"new hire"* teachers are different. It has been considered reasonable to ask for a criminal records check as a pre-service requirement for successful applicants after an open job competition as a part of the offer for employment. Ontario and British Columbia have since 1998 passed legislation that new teachers must be screened for criminal convictions.

Certification of Teachers Regulation (Alberta Regulation 3/99) has several clauses which speak to the public right to know. Clause 12(1)[10] states that

> The Registrar may refuse to issue or re-issue an interim professional certificate or extend the term of an interim professional certificate
> (a) If the applicant…
> (ii) Has committed an act that resulted in the applicant's conviction of an indictable offence in Canada or an equivalent conviction in a jurisdiction outside Canada
> (iii) Held a certificate issued in Alberta or elsewhere that has been suspended or cancelled as a result of unprofessional conduct or unskilled or incompetent teaching

Each teacher applying for certification in Alberta must complete *The Teacher Certification Confidential Disclosure and Criminal Record Check.*[11] Applicants are asked if they

1. have "ever been denied, or had suspended or cancelled any certificate, permit or license to teach
2. are "currently charged with any offence under any statute
3. have ever been convicted or pardoned under the *Criminal Records Act* of a criminal offence under any statute
4. if they have ever been given a conditional discharge,

in Canada or in another country and to provide details. Applicants must authorize Alberta Learning to do criminal record checks, background checks or inquiries from any police or other authority.

Several Canadian provinces provide public funding to religious based schools, notably Catholic. A number of Catholic (separate) school districts in Alberta recently attempted to require that school administrators and priests complete forms about individual teachers and how they practice their faith in the local parish.[12] An attempt to determine degree of catholicity exceeds the school board's authority. Catholic public boards have a right to expect that employees do not publicly violate the tenets of the faith. However boards cannot use their special right to operate religious schools as grounds to violate individual rights under the *Canadian Charter of Rights* and *Freedoms (*Sections 2 and 8) *or the Alberta Bill of Rights* (Section 2). Once an employment contract exists, Board demands must be consistent with the minimum required to exercise its constitutional rights. Intrusive invasions of privacy and artificial measurements of catholicity to meet an arbitrarily imposed standard exceed the requirement and are abuses that violate

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[10] Alberta Education *Certification of Teachers Regulation, December 199, p 15.*.
[11] Alberta Learning *Alberta Teacher Certification*, July 2000.
[12] Calvin Fraser, Alberta Teachers' Association, unpublished article *Catholicity and School Board Rights.*

individual religious freedom rights. Individuals have the right to practice their faith in their own way. A decision of the Alberta Court of Queen's Bench in 1988 (Starland School Division v Alberta) clarified the high responsibility expected:

> Just as the freedom of religion includes "the right to declare religious beliefs openly and without fear of hindrance of reprisal', it must also include the right not to declare one's religious beliefs and the right not to have to justify one's own declaration of religious belief or to have to provide "information" as to why one has openly declared a particular religious belief or as to why one believes he entertains a particular religious belief.

The use of a pre-employment application form which, in effect, restricts staff to practicing Catholics and to a pre-service declaration of faith and reference is consistent with the rights of a Catholic school system under the constitution and the case law developed over the years.

Expectations of privacy for employer held information

"Personal information" is defined in the *FOIPP Act* as "recorded information about an identifiable individual" and "local public body" is defined as "an educational body, a health care body, or a local government body".[13] Section 16 of the Act requires that local public bodies deny access if a request is an invasion of a third party's personal privacy. Confidentiality of employee records can result in some records being exempted when it is established that the information was received in confidence. Employers cannot guarantee confidentiality, but can made a commitment to describe the material as confidential and to follow security measures. FOIPP also addresses the need for policies regarding transitory records and security of records when parties leave their employment or transfer. Every school district had to identify a FOIPP officer who determines at the district level the application of requests.

The *Personal Information Protection and Electronic Documents Act* provides certain rights and protections to individuals with respect to their personal information held by commercial organizations. This can also apply to personal information about employees, some of which is deemed not to be personal-- employees' names, title, business address and telephone number.[14] Statutory authority under Section 118 of the *School Act* permits employers to require employees to submit to medical examinations.[15] Prior to the privacy legislation some employers tried to use this authority to get extensive and intrusive reports on employees complete medical history.

Mr Justice La Forest concluded that individual privacy interest encompasses not only one's person and premises, but extends to information that is personal to oneself. As such public bodies must respect privacy in relation to information.

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[13] *FOIP Human Resource Guide for Local Public Bodies*, December 1998, p 1.
[14] McNairn, p 189.
[15] *School Act, p 89.*

> This too is based on the notion of dignity and integrity of the individual..."This notion of privacy derives from the assumption that information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.' In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations about where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulges, must be protected".[16]

Employer held information related to:

a. Health

Increasingly teachers are expressing concerns about invasions of privacy when school boards request medical information. For example, CBE (Calgary Board of Education) sick leave reporting procedures on several occasions over the past 3 or 4 years have included requests that physicians and teachers complete a medical certificate for submission to the Employee Health Resource Center. This certificate included detailed information about the nature of the present illness as well as other medical information. In communication that CBE sent out in October 2001, there was an inference that this new standardized medical certificate complies with the 1998/2001 CBE - ATA collective agreement and is therefore acceptable to the Association. This could not be further from the truth.

An employer is not entitled to any detailed medical information beyond the doctor's assessment that (a) the teacher is ill, (b) a treatment plan exists (but not the content), and (c) a tentative indication of treatment. No medical doctor or dental practitioner is required to provide the medical certificate. In Calgary, a teacher after an absence in excess of five teaching days is required to submit a "certificate of illness'" (clause 17.8 of the collective agreement) but that is all.

The employer had no right to such information. Similar forms were requested by other employers. The request for this information is highly invasive, resulting in a violation of personal privacy. Issues of diagnosis and treatment are a matter between an individual and his physician. An employer is not entitled to this information in Canadian law, only to that which directly relates to the employer's ability to conduct his business. Benefits are a negotiated right not subject to arbitrary control.

At the point that an employee requires an accommodation of working conditions because of medical disability, the employer has a right to receive sufficient information related to the type of accommodation required. This right is not unfettered there have been issues with regards to the extent of requests for medical information for accommodations. Case law clearly demonstrates that the employer can request only medical information that addresses the specific accommodations that need to be made for the employee. The individual right to privacy is paramount.

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[16] R v Dyment, 1988, pp 429-430.

b. Electronics

Electronic invasions of privacy are also controlled. Section 184 of the *Criminal Code* of Canada sets out the parameters for an offence when a person uses an electromagnetic, acoustic, mechanical or other device to intercept a private communication.[17] The *Telecommunications Act (Alberta)* and the *Manitoba Telephone Act*[18] both prohibit the attachment of listening devices to telephone wires unless these are approved or installed by the telephone service provider. Employer monitoring of telephone and voice mail are illegal unless the employer has made employees aware that this will occur, or has the express consent of the employee.

Electronic mail messages are not considered private communications. However, it may be an offence under the *Criminal Code* (Section 84) to intercept private messages and under Section 193 to disclose the contents or existence of such communication. In R V Commisso, Chief Justice Dickson of the Supreme Court of Canada[19] stated

> The technology permits massive invasion of the privacy [sic] with ease. It is also indiscriminate about the content of any communication intercepted. Parliament has determined that this potential constitutes a threat to individual freedom ad the right to privacy.

Section 36 of the Alberta FOIPP Act requires that public bodies protect personal information by maintaining reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction. Public bodies must implement appropriate security procedures or place restrictions on e-mail use.

There is only one case in Canadian law where an arbitrator supported an employer who focussed cameras on employees as they work. The employer use of the surveillance in *Puretex Knitting Co and Canadian Textile & Chemical Union*[20] could be used only for the purpose related to the employer's justification that this was to deter theft. Within a number of Alberta schools, cameras are placed in hallways, lunchrooms, etc to monitor student behavior. A defence for any teacher whose behavior was being monitored by the video surveillance in that this constitutes a much greater intrusion into his/her privacy would include arguments from the *Charter of Rights and Freedoms, FOIPP* and *the 2001 Personal Information Protection and Electronic Documents Act*. The individual would be protected.

Pre-employment conduct disclosed to the employer

School boards ask questions of prospective employees regarding criminal convictions, criminal charges, and related child welfare issues. School boards derive their authority to operate from the *School Act* which restricts the exercise of any rights or powers to act reasonably. "Presumably the right to hire includes the responsibility to do so in a manner that ensures the

[17] Section 184 *Criminal Code*, R S C, 1985.
[18] McNairn, 275.
[19] McNairn, p 276.
[20] McNairn, p 174

mission of the board is fulfilled safely and that all reasonable precautions are taken to ensure foreseeable risks are precluded".[21]

In the absence of specific limiting legislation job applicants can be harmed by specific types of questions. Unfortunately, Alberta does not have that legislation. *The British Columbia Human Rights Code* specifically indicates that a prospective employee cannot be asked if they have ever been charged with a criminal offense except where it is a bona fide occupational requirement.[22] The *Canadian Human Rights Code* does provide that an employer cannot discriminate against a prospective employee due to a conviction for a criminal offense nor for a criminal offense for which that employee has received a pardon. However, the *Canadian Human Rights Code* also provides that if there is a *bona fide* occupational requirement for not hiring an employee with a criminal conviction, or a criminal conviction for which they have received a pardon, an employer can refuse to employ that prospective employee.[23] Because teachers are entrusted with the care of children and are expected to model appropriate social behavior, such screening has been seen to meet the test of "public good". Once again we see balanced protection for society and the individual.

Child welfare record checks services can be required as a condition of employment for teachers or others entrusted with the care of children. If a check shows that the individual may have caused a child to need protection, records may be requested through FOIPP legislation. Some school boards are also requiring them of volunteers. It is being considered to require them of student teachers.

Alberta's *Freedom of Information and Protection of Privacy Act states* that a teacher has a right to know what is said to a potential employer. The Act defines personal information to include "information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given" Section 32 of the Act limits collection of personal information to that which is specifically authorized by statute, collected for law enforcement, or that which "relates to and is directly necessary for an operating program or activity". In light of current societal mores, standards and fears as well as the public right to know, requirement of a criminal record check from successful applicants as a condition of employment is considered reasonable. The requirement must be clear before a contract is signed or recognized in the contract.

All applicants for certification in Alberta must declare any criminal records as well as current criminal charges.

Off-duty Conduct

The general rule is that an employer may not consider an employee's conduct outside the workplace in making employment-related decision, unless the conduct relates in some way to the individual's employment.

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[21] Criminal Record Checks by School Boards: A Privacy Issue. Unpublished.
[22] Ibid.
[23] Legal opinion Edmonton Public School Board --Job Application Questions, January 2001.

Another case spells out what off-duty conduct on the part of an employee might attract justifiable discipline, by requiring the employer to show that:

- the conduct of the employee harms the employer's reputation or product;
- the employee's behavior renders the employee unable to perform his or her duties satisfactorily;
- the employee's behavior leads to refusal, reluctance, or inability of the other employees to work with him or her;
- the employee has been guilty of a serious breach of the Criminal Code, thus rendering his or her conduct injurious to the general reputation of the employer and its employees; or
- the employee's conduct places difficulty in the way of the employer properly carrying out its function of efficiently managing its works and efficiently directing its working forces.[Privacy Law in Canada, p 182 from Air Canada and International Assn of Machinists, Lodge 148 (1973).]

[New Brunswick, 1996]

Post employment release of information - a former employee no longer in the public sector

Former employees may come under scrutiny, especially in criminal charges brought on behalf of former students, and in complaints of unprofessional conduct brought once again on behalf of students or former students.

All teachers in public education in Alberta are subject to the *Teaching Profession Act*.[24] Section 22 of the TPA defines unprofessional conduct as "conduct of a member that... is detrimental to the best interests of students..., the public, or the teaching profession, ... " Teachers are required to self-report criminal convictions. For example, in Section 22(2) "If a member has been convicted of an indictable offence (a "felony" in the United States), (a) the conduct of the member on which the conviction is based is deemed to constitute unprofessional conduct, and (b) the member shall inform the association of the conviction forthwith.[25] Failure to report gives rise to punishment when other mechanisms bring the offence to light.

School superintendents are also required to report convictions and the Teachers' Association local reports indictments as well. A teacher may be investigated as long as the complaint has come in within five years of the teacher leaving the profession. Other offences may also be found to be unprofessional conduct. If the consequence or penalty is a suspension or cancelation of certificate, this is made public, and reported to all teacher organizations and certification agencies in the country which automatically disqualifies the individual from being licenced to teach anywhere in Canada. Hearings are open to the public unless the complainant or hearing committee requests privacy. Legal challenges have determined that the process is fair.

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[24] The Alberta Teachers' Association *Members' Handbook*, pp 17-34.
[25] Ibid.

It has been argued that confidentiality clauses in structured settlement and severance agreements inhibit the public "right to know". There is a fine line between "need" and "nosiness"--a balance that is protected by privacy legislation. When combined with the procedural fairness provisions and natural justice provisions the rights of both society and individuals are well protected.

Anonymity

In Alberta, since 1998 FOIPP rulings have clarified that employees have a right to letters of complaint against them. The only time this would not be the case would be when there is an "exceptional circumstance" when disclosure would endanger someone. This is rarely the case in a school. Therefore teachers have a right to copies of any documents which raise complaints against them. Other components of the Act require the complainant's information to be handled in a respectful manner maintaining confidentiality within the school. [26]

Disclosure of "work history" from a teacher's personnel record at school or with the district would be an unreasonable invasion of the teacher's privacy. Even the opinions and evaluations of investigators are personal information that must be made available to the teacher.

There is room for common sense and administrative need. A FOIPP challenge upheld the right of the principal to consult with the Superintendent about a child and parent without the communication having to be disclosed to the parent. This was a big win for school administrators. The parent applied to FOIP for all information to be provided to her. The school board and teachers' association worked together on this case. For the hearing the Association applied for intervenor status and supported the board. The decision was that the communication between the superintendent and the principal was privileged and the parent did not have a right to access of it.

Challenge to a union to meet its duty of fair representation

In Alberta, the teachers' association is relieved of its duty of fair representation by legislation which provides a broad series of checks and balances instead of massive collective agreements. Teachers, on a voluntary basis and as part of a genuine desire to work with and for all members, work to ensure that rights which exist elsewhere are respected. Recently a teacher successfully argued that the Association had not represented her fairly. The ATA local had sat on the judgment committee. The party from the ATA local who had taken the grievance forward also sat on the Board/Liason committee. When the grievance was lost, the local representative did not take it forward or advise the teacher that she could.

Collective bargaining relationships and contract provisions are minimal in Alberta. Collective agreements are very brief with as little as 11 pages. Very few of them have any working condition clauses and those we have will be stripped through the governments legislated settlements by August 31, 2002.

Statutory Authority

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[26] Calvin Fraser, unpublished

The "reasonableness" principle is fundamental to Canadian Law. Rights and freedoms protected by the Charter and human rights legislation are subject to tests of reasonableness. The duty of care owed by employers to their employees, by educators to their students, is qualified by a reasonableness standard and once again requires the balancing of individual privacy and the public right to know.

In Canada case law is limited with respect to privacy rights of teachers. Other legislation such as the *Teaching Profession Act* and FOIPP clarifies matters. Rulings such as Hampshire (ATA had intervenor status in supporting the school board against FOIPP requests by parents to have the documents provided by school principal to the superintendent made available to them. In a recent ruling of the Court of Appeal, the continued requests by the district to have detailed medical information about the teacher was a clear violation of her privacy rights. Although there were other elements to this transfer case, the above decision was a big win for the teachers. This was the first case in which we not only had the teacher reinstated with almost three years of retroactive salary and benefits but the teacher was awarded punitive damages of over $150 000 and costs were awarded. An individual's right to privacy continues to evolve through legislation, case law and in some provinces, collective agreements. That is not the case in Alberta. Collective bargaining agreements in Alberta, for the most part, are silent on the employee's right to privacy. The Edmonton Public School District No 7 does have a clause that states that teachers have a right to see their personnel file. This is a moot point as the *Freedom of Information and Protection of Privacy Act* addresses this matter for all employers and clearly states that all teachers have a right to disclosure of personal information about them, as well as a right to privacy of personal information.

Legislation which enables employers, the minister, or the Association, to create regulations covering specific topics such as certification, practice review, Code of Professional Conduct and board policies, processes are in place to deal with matters which might otherwise have resulted in challenges in the courts.

Conclusion:

The theme of "striking a balance in education' is central to the practical application of issues of privacy, confidentiality and public right to know. Essential to the task of attempting to balance competing interests and rights, is a consideration of the individual facts and circumstances of each case. These must be carefully balanced in the context of the public interest, relevant legislation and fundamental principles of fairness, due process and the common law duty of care. If anything, privacy rights in Canada are perhaps enshrined in the collective—in the rights and responsibilities of teachers. Teacher certification and the Code of Professional Conduct require self reporting as well as reporting of others who a member believes is guilty of conduct that contravenes the Teaching Profession Act.

Outline

1) Grounding in question of Rights
2) Justice LaForest
3) Balance of rights of individual and society
   a) Absolute rights vs paramount or precedent rights
   b) System of checks and balances
4) Americans will see significant variations in looking at the foundations underlying rights protections
   a) Natural justice arising from common law
   b) The charter
5) The public employee
   a) More scrutiny vs more protection
   b) - security - nature of the person's who brings -
      more accountability the employee into the public eye
      criminal
      employ
      professional
      public opinion

6) Statutory Authority
7) Conclusion - balance

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Common Law Privacy in Educational Settings

I. Common Law Privacy

A. Background information

In 1890, Mrs. Samuel D. Warren, daughter of Senator Bayard of Delaware and wife to a wealthy young paper manufacturer, held a series of social engagements at her home in Boston. The newspapers of Boston, in sections of the paper specializing in Brahman "blue blood" society, published highly personal and embarrassing details about the parties. Mr. and Mrs. Warren were not amused. When the newspapers became exceptionally intrusive in publicizing the marriage of one of their daughters, Mr. Warren decided to take action. Mr. Warren had just the year before left the practice of law to take over an inherited business. Mr. Warren, second in his Harvard Law class, teamed with Mr. Brandeis, classmate of Mr. Warren and valedictorian of the class, to pen an article that is often identified as the best example of how law review articles can influence future development of the law.

B. Argument for Existence

1. Warren and Brandeis, The Right to Privacy, 1890, 4 Harv. L. Rev. 193.

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.
> 4 Harv. L. Rev. 193, 196 (1890).

2. Argued for existence of right to privacy as a new cause of action.
3. Demonstrated right to privacy as rooted in, yet separate from:
   breach of property right,
   breach of contract, or
   breach of trust.

Prince Albert v. Strange, 1 McN. & G. 23 (1849). (Where etchings produced by Queen Victoria and her consort were taken, copies of them *as well as a description of them in the form of a catalog*, could not be published as an invasion of the property.)

Tuck v. Priester, 19 Q.B.D. 639 (1887). (Where owners of a picture contracted with another to make a certain number of copies, and the contractee produced additional copies for sale at a lower price, Lords Justices differed as to application of copyright law but agreed unanimously on breach of contract.)

Pollard v. Photographic Co., 40 Ch.Div. 345 (1888). (Where a photographer took a woman's photograph and was restrained from showing it or selling copies of it, as a breach of an implied term of contract and a breach of confidence.)

Abernathy v. Hutchinson, 3 L.J. Ch. 209 (1825). (Where famous surgeon sought to block publication in "Lancet" his unpublished lectures delivered at St. Bartholomew's Hospital, court recognized that unpublished lectures had not been "fixed" so as to invoke copyright, but that those hearing the lecture had breached a confidence in publishing what they had not obtained the right to sell.)

> Political, social, and economic changes entail the recognition of new rights, and the common law, *in its eternal youth*, grows to meet the demands of society. 4 Harv. L. Rev. 193, 193.

4. Corollaries, Limitations on the right:
   Matters in the public or general interest do not invade privacy.
   Matters published in circumstances which would render it privileged under defamation law do not invade privacy. (e.g., legal opinions; legislative statements; communications in a public body)

Invasion of privacy by oral publication in the absence of special damages do not invade privacy.
Publication of the facts by the individual or with his consent do not invade privacy.
Truth of the matter does not create a defense.
Absence of malice does not create a defense.

5. Remedies

Tort action for damages, including injury to feelings.
Injunctive relief.

C. Taxonomy for the Right to Privacy Prosser, Privacy, 1960, 48 Calif. Law Rev. 383.

1. Intrusion on Seclusion

To prevail upon a claim for intrusion upon seclusion, a plaintiff must show by a preponderance of the evidence a) an intentional intrusion, physically or otherwise, upon the solitude or seclusion of plaintiff, or his private affairs; b) with respect to the matter or affair which plaintiff claims was invaded, that plaintiff had a legitimate and reasonable expectation of privacy; c) that the intrusion would be highly offensive to a reasonable person; and d) that the defendant's conduct was a proximate cause of damage to the plaintiff. Restatement (Second) of Torts, Section 625B (1981). (*See*, Souder v. Pendleton Detectives, 88 So.2d 716 (La.App. 1956), where detectives spied into windows of plaintiff's home.)

2. Public Disclosure of Private Facts

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
a) would be highly offensive to a reasonable person, and
b) is not of legitimate concern to the public. Restatement (Second) of Torts, Section 625D (1977). (*See*, Melvin v. Reid, 112 Cal.App. 285 (1931), where former prostitute had been a defendant in sensational murder trial, married, and reformed her life, but release of motion picture ruined her life by revealing her past.)

3. False Light in the Public Eye

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy if
a) the false light in which the other was placed would be highly offensive to a reasonable person, and
b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter, and the false light in which the other would be placed. Restatement (Second) of Torts, Section 625 E (1981). (*See*, Martin v. Johnson Pub. Co., 157 N.Y.S.2d 409 (Sup.Ct. 1956), where picture of innocent women was used in publication with caption "Man Hungry Woman".)

4. Appropriation

Appropriation of another's name or likeness occurs when a defendant makes use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose, or for defendant's own purposes and benefit even though the use is not a commercial one, and even though the benefit sought to obtained is not a pecuniary one. Restatement (Second) of Torts Section 652C, comment b (1977). (*See*, Levey v. Warner Bros. Pictures, 57 F.Supp. 40 (S.D.N.Y. 1944), where ex-wife of George M. Cohan, named Mary, sued motion picture company for use of name Mary in biography of Cohan, where the part of Mary was entirely fictionalized.)

D. General Acceptance of Right to Privacy Across Jurisdictions

By 1980, every state except Rhode Island had recognized a right of privacy in some form. Note, Tort Recovery for Invasion of Privacy, 1980, 59 Neb.L.Rev. 808. Subsequently, the Rhode Island legislature recognized such a right, R.I. Gen. Laws Sec. 9-1-28.1(a)(1), so that at least some form of common law privacy now exists in every State of the U.S.

20

II. Applications of Common Law Privacy in Educational Settings

A. Intrusion on Seclusion

Doe v. Gonzaga University, 24 P.3d 390 (Wash. 2001). (Where student teacher was denied positive recommendation for teacher certification, growing out of faculty discussions concerning alleged sexual assault, including the plaintiff's personal relationships, habits, and anatomy, supreme court upheld $1.105 million of $1.115 million award for defamation, breach of educational contract, invasion of privacy, violation of FERPA rights, and punitive damages for violation of FERPA rights.)

Jarrett v. Butts, 379 S.E.2d 583 (Ga.App. 1989). (Where teacher, serving as yearbook photographer, allegedly took pictures of female student in classroom and hallway against her will, allegedly forced her to pose for the pictures by intimidation, and allegedly touched her wrists and hair to position her for the pictures, student sued for invasion of privacy, assault and battery, and violation of constitutional right to privacy under section 1983. Court held that intrusion did not occur by taking photo in public area when other students were present, because the photos did not reveal any aspect of the student other than what was readily visible; nor was there appropriation because the photos were never sold nor used for commercial gain. Note that the court was seeking a physical intrusion similar to trespass. Court rejected the section 1983 *constitutional* privacy claim in the lineage of Katz v. U.S. and Griswold v. Connecticut, holding that a *general* right to privacy is left largely to the States.)

Young v. St. Landry Parish School Bd., 673 So.2d 1272 (La.App. 1996). (Where high school student sued teacher and school board member for invasion of privacy, after teacher looked into student records to determine if an improper grade change had been made, and the board member received a copy of the grade sheet and sent it to an investigator in the state department of education, court held that no intrusion occurred. Court stated that the reasonableness of a defendant's acts is determined by balancing the interests of the plaintiff in protecting his privacy with the defendant's interest in pursuing his course of action; not necessary to show malicious intent.)

Brousseau v. Town of Westerly, 11 F.Supp.2d 177 (D.R.I. 1998). (Where 10 year old female student along with the rest of her class, was subjected to pat-down search, consisting of patting the area over the front and back pockets and the ankles, in an attempt to find a 13.5 inch knife missing in the cafeteria, student sued for invasion of privacy. Court distinguished privacy right under 4th Amendment from a cause of action under R.I.Gen. Laws sec. 9-1-28.1(a)(1) for *unreasonable* invasions of privacy. Court found the pat-down search reasonable in the circumstances.)

Doe v. High-Tech Institute, Inc., 972 P.2d 1060 (Colo.App. 1998). (Where student in medical assistant program consented to blood test for rubella test, but blood sample was used instead to conduct an HIV test, student sued for intrusion on seclusion and unreasonable disclosure of private facts. Trial court dismissed intrusion claim and entered judgment on jury's verdict on disclosure claim, and student appealed. The appeals court reversed and remanded, holding that the two privacy claims have separate elements and are thus not duplicative actions.)

Kelley v. Troy State University, 923 F.Supp. 1494 (M.D.Ala. 1996). (Where university employee sued university and officials under Title VII, Title IX, equal protection, assault and battery, and invasion of privacy for alleged sexual harassment. Court denied summary judgment on intrusion claim, on basis of allegations about making sexually explicit remarks, making jokes about women, and making degrading personal comments (e.g., she was having a "blond attack").)

Simon v. Morehouse School of Medicine, 908 F.Supp. 959 (N.D.Ga. 1995). (Where employee alleged sexual discrimination including rape, hostile work environment, constructive discharge, and intrusion on seclusion, court held that plaintiff alleged sufficient facts to support an unreasonable intrusion upon the plaintiff's seclusion.)

Liu v. Striuli, 36 F.Supp.2d 452 (D.R.I. 1999). (Where Taiwanese student alleged sexual harassment and rape by college immigration official, in violation of Title IX, VAWA, R.I.Civil Rights Act and R.I. Privacy Act, as well as claims for assault and battery, intentional and negligent infliction of emotional distress, and negligent hiring and supervision, court denied summary judgment on intrusion and publication of private facts privacy claims.)

Munson v. Milwaukee Board of School Directors, 969 F.2d 266 (7th Cir. 1992). (Where former school principal sued for defamation and violation of privacy when school officials followed him and kept him under surveillance to determine if he actually lived in the school district according to the district's residency policy, the court affirmed summary judgment, calling the claims "frivolous.")

21 BEST COPY AVAILABLE

Trout v. Umatilla County School Dist. UH3-Milton-Freewater, 712 P.2d 814 (Ore.App. 1985). (Where teachers who had been disciplined following a party and an alcohol-related automobile accident, received jury verdict of $75,000 on claims of breach of contract, outrageous conduct, and invasion of privacy, the appellate court reversed on all grounds. The events occurred publicly thus no intrusion on seclusion occurred.)

Tombrello v. USX Corp., 763 F.Supp. 541 (N.D.Ala. 1991). (Where employee of steel company, in job training program, refused to sign consent form to release his transcripts and technical school did not release his transcripts, and thus did not receive reimbursement for his tuition, employee sued under Fair Labor Standards Act and intrusion privacy. Court held that FLSA provided exclusive remedy and that no intrusion occurred.)

Doe v. Mobile Video Tapes, Inc. 43 S.W.3d 40 (Tex.App. 2001). (Where high school band director, under direction of principal, set up camera in changing area of girls' dressing room to catch a thief, and the videotapes later fell into the hands of a tv station, the girls sued the tv station for invasion of privacy under three theories, defamation, defamation per se, and intentional infliction of emotional distress. The trial court granted station summary judgment as to some of the students, but the case went to trial. After a jury trial, the court entered a directed verdict in favor of the tv station and students appealed. The appeals court affirmed, holding that band director's actions were matter of public concern. No intrusion, no broadcast of private facts, and no negligent invasion of privacy.

Kuhn v. Account Control Technology, Inc. 865 F.Supp. 1443 (D.Nev. 1994). (Where debtor was subjected to dunning calls at her place of employment from collection agency, in connection with her student loan payments, debtor sued agency for invasion of privacy, court denied agency's motion for summary judgment on intrusion claim, but granted motion for broadcast claim.)

Baughman v. State, 45 Cal.Rptr.2d 82 (Cal.App. 1995). (Where university police conducted warranted search to plaintiff's rented property and damaged computer disks containing plaintiff's research product in the process, plaintiff sued for invasion of privacy , conversion, and negligent infliction of emotional distress, trial court granted dismissal of privacy and emotional distress claims. The court used a balance of interest inquiry and determined that the need for the search outweighed the plaintiff's interest in privacy.)

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993). (Where assistant basketball coach taped phone conversations with basketball player prospect, player sued under both federal and state wiretap statutes. The court had to investigate the privacy tort claim for the federal statute to apply. Court held that it could not be intrusion if the harm flows form the publication rather than the intrusion, and that there could not have been disclosure of a private fact because the broadcast concerned a matter of public interest.)

Socialist Workers Party v. Attorney General of the United States, 642 F.Supp. 1357 (S.D.N.Y. 1986). (Where FBI had engaged in surreptitious entries into the youth arm of the SWP, SWP had made out an actionable case of intrusion privacy against the FBI under state tort law as well as claim under Federal Tort Claims Act.)

Ghassomians v. Ashland Independent School Dist., 55 F.Supp.2d 675 (E.D.Ky. 1998). (Where principal read and copied yellow pad given to him by student, and yellow pad was a "diary" kept by a teacher concerning the teacher's thoughts about the principal and other staff members, the teacher sued for intrusion on seclusion and publication of a private fact, defamation, and national origin and gender discrimination under Title VII. Court held that there was no intrusion on seclusion because the principal came upon the yellow pad in an unoffensive way, and that there was no "publicity" by sharing with a supervisor.)

B. Public Disclosure of Private Facts

(From above): Doe v. High-Tech Institute, Inc., 972 P.2d 1060 (Colo.App. 1998). Liu v. Striuli, 36 F.Supp.2d 452 (D.R.I. 1999). Doe v. Mobile Video Tapes, Inc. 43 S.W.3d 40 (Tex.App. 2001). Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993). Ghassomians v. Ashland Independent School Dist., 55 F.Supp.2d 675 (E.D.Ky. 1998).

Wynne v. Loyola University of Chicago, 741 N.E.2d 669 (Ill.App. 2000). (Where fellow faculty member wrote memo about plaintiff professor objecting to her potential selection as department chair, plaintiff sued university and employees for defamation per se, defamation per quod, false light, public disclosure of private information, and intentional and negligent infliction of emotional distress. Court held that there was no disclosure of private facts because it was the plaintiff who had made the disclosures; there was no false light because the information was "substantially true.")

Wood v. National Computer Systems, Inc., 643 F.Supp. 1093 (W.D.Ark. 1986), aff'd 814 F2d 544 (8th Cir. 1987). (Where testing company sent score reports to wrong teachers, teacher sued for public disclosure of private facts and IIED. Company was awarded summary judgment. Court also held no private right of action under statute requiring that test scores be kept confidential.)

Wasser v. San Diego Union, 236 Cal.Rptr. 772 (Cal.App. 1987). (Teacher, current wife, and his children sued newspaper for public disclosure when newspaper, in article about teacher's action against school district challenging his teacher evaluations, recanted news articles from 11 years prior, when teacher had been acquitted of murdering his first wife. Appeals court affirmed judgment for newspaper, because teacher had repeatedly sued somebody over the years and the instant action concerned his ability to handle stress, going back to his wife's murder.)

Avins v. Moll, 610 F.Supp. 308 (E.D.Pa. 1984), *aff'd*, 774 F.2d 1150 (3rd Cir. 1985). (Where former law school dean sued law school alleging disclosure of private facts, in the submission by the school of two letters written by the former dean to a school grievance committee. Court granted defendant's motion for summary judgment, on grounds that the letters did not relate to plaintiff's private life, thus were not private.)

Wasson v. Sonoma County Junior College District, 4 F.Supp.2d 893 (N.D.Cal. 1997). (Where a junior college moved to terminate instructor/administrator of junior college, then withdrew the termination action. College officials believed instructor/administrator had posted a flier and sent the board five anonymous letters critical of the college president. The college hired a document examiner who testified that handwriting on envelope and prose style of letters was consistent with instructor/administrator. Instructor/administrator sued college on variety of theories, including 4th Amendment privacy and public disclosure privacy. Court held that plaintiff had no reasonable expectation of privacy in the letters; and there was no evidence of private facts, only the facts alleged in plaintiff's own complaint.)

Culver v. Port Allegany Reporter Argus, 598 A.2d 54 (Pa.Super. 1991). (Where newspaper reported parents' request for reimbursement for psychological services for their disabled daughter at a school board meeting, including the fact of the daughter's disability, parents sued newspaper for public disclosure of private facts. Court affirmed lower court's dismissal of complaint, holding that expenses for psychological services was a public rather than private fact.)

Russell v. Salve Regina College, 890 F.2d 484 (1st Cir. 1989). (Where college asked student to withdraw from nursing program because she was overweight, student sued college for IIED, intrusion, and breach of contract. Trial court entered directed verdict on IIED and privacy claims, but entered jury judgment award of $43,903 on the contract claim. On appeal, court found conduct unprofessional but not outrageous. Court found no intrusion, because the only area "invaded" was the student's psyche. Court upheld contract claim. On remand, appellate court held that doctrine of substantial performance applied to the contract. 938 F.2d 315 (1st Cir. 1991).

Gallo v. Princeton University, 656 A.2d 1267 (N.J.Super. 1995). (Where university facilities supervisor resigned after instigation of investigation into allegedly improper use of university equipment, and university officials reported to student newspaper that investigation revealed use of university equipment and for personal gain, and that supervisor was one of three officials who resigned as result of the investigation, supervisor sued university for defamation, constructive discharge, and public disclosure privacy. Court held that investigation of university equipment was not a private matter.)

Woodard v. Sunbeam Television Corporation, 616 So.2d 501 (Fla.App. 1993). (Where tv station broadcast report on bus drivers with criminal convictions, bus driver sued station for defamation and privacy violation for false reporting that he had been convicted of murder—rather than attempted murder. Court affirmed summary judgment on grounds that conviction records of bus drivers was an issue of public concern.)

Levine v. Board of Educ. of City of New York, 589 N.Y.S.2d 181 (N.Y.A.D. 1992). (Where board disclosed mental health problems of teacher in Article 78 review committee hearing, appellate court affirmed dismissal of claim on grounds that disclosure of the private fact was necessary for the functioning of the review committee and was therefore in the public interest.)

Lindemuth v. Jefferson County School Dist., 765 P.2d 1057 (Colo.App. 1988). (Where junior high assistant coach had pled *nolo contendere* 14 years prior for performing unnatural carnal copulation with an 11 year old boy, head coach notified school district officials of assistant coach's past. Assistant coach brought IIED, defamation, and public disclosure claims against the school district, arguing that the passage of time had rendered his past behaviors private. The court affirmed summary judgment for the school, because the mere lapse of time did not render the information private; public had an interest in knowledge of his past.)

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Richardson v. Newburgh Enlarged School Dist., 984 F.Supp. 735 (S.D.N.Y. 1997). (Where high school English teacher had allegedly provided copies of ETS testing materials to her advanced placement students and was asked to resign, teacher sued district for constructive discharge, racial discrimination, breach of contract, and violation of common law privacy. Court held that New York does not recognize common law privacy.)

Corbally v. Kennewick School Dist., 973 P.2d 1074 (Wash.App. 1999). (Where substitute teacher was terminated for allegedly keeping sexually explicit drawings in a storage room near the classroom, and was able to successfully arbitrate his return to employment under the collective bargaining agreement, a local newspaper ran follow-up articles containing statements from school officials expressing their disappointment in the ruling and reluctance to reinstate the plaintiff to a teaching position. Teacher sued school district for negligent investigation, defamation, and public disclosure of private facts. The trial court granted summary judgment to the school district. The appeals court affirmed on the negligent investigation and defamation claims, but reversed on the privacy claim and remanded in light of a recent supreme court decision recognizing a common law right to privacy in Washington state.)

Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996). (Where college student alleged that she was sexually assaulted at party thrown by university criminal justice club, student sued university officials based on their alleged mishandling of the investigation. Plaintiff claimed that university police officer violated her privacy rights by commenting to witnesses at the party his summarized impressions of the women's testimony. Court rejected claim because the witnesses were in the process of disclosing the same information to the police officer and because the officer had qualified immunity.)

Smith v. School Dist. of Philadelphia, 112 F.Supp.2d 417 (E.D.Pa. 2000). (Where school board pressured a parent association to remove a community activist from the presidency of the association, after targeted school employees released an anti-white, anti-Semitic letter written by the activist, activist sued school board on 1st Amendment, civil rights, IIED, defamation, and privacy claims. The court held that release of the letter by the activist was not public disclosure of private facts, because the plaintiff's letter was not private. Court also rejected a false light claim, because the publication of the plaintiff's own words in his own letter cannot subject himself to false light.)

Williamson ex. rel. Williamson v. Keith, 786 So.2d 390 (Miss. 2001). (Where attorney for school district subpoenaed medical records of special education student in preparation for due process hearing and shared information with special education coordinator, but neglected to serve papers on student's counsel, student sued for abuse of process and violation of privacy. Court held that the privacy tort of public disclosure of a private fact requires "publicity," not "publication" in the defamation sense. Thus, the court affirmed the grant of summary judgment for the attorney. On abuse of process charge, court held that an essential element, ulterior motive, was not shown.)

Iwenofu v. St. Luke School, 724 N.E.2d 511 (Ohio App. 1999). (Where parochial school principal investigated allegations of improper sexual conduct by student with long history of sexually-inappropriate behaviors, by questioning girls in class, student sued principal, school, and diocese, for breach of contract, constitutional violations, defamation, negligence, malicious criminal prosecution, and invasion of privacy. Court held that principal's investigation of student's actions could not violate privacy, because the information was a matter of concern to the school community and already known to numerous students. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.")

Wooten v. Pleasant Hope R-VI School Dist., 139 F.Supp.2d 835 (W.D.Mich. 2000). (Where coach talked over a softball player's absences from a game with teammates before deciding to expel player from the team, the player sued the coach and school district for violation of privacy, due process, and IIED. The court held that the player's absence was not a private matter but a matter within the public interest because it affected her teammates and potentially the success and reputation of the whole team.)

C. False Light in the Public Eye

Phillips v. Lincoln County School Dist., 984 P.2d 947 (Or.App. 1999). (Where teacher required student to refrain from using her nickname "Boo," a street name for marijuana, student sued teacher for IIED and false light privacy. Court held that teacher did not say that "Boo" used "boo," rather teacher only asked "Boo" to quit using the name "boo." Consequently, the teacher did not put "Boo" in a false light.)

Salek v. Passaic Collegiate School, 605 A.2d 276 (N.J.Super. 1992). (Where teacher sued her sister—the principal—and her niece—the yearbook supervisor—for printing a picture in the yearbook "funny pages," such picture portraying teacher with a male teacher and the male teacher holding his hand to his forehead,

with the caption "not tonight, I have a headache," the teacher sued her family members and the school for negligent supervision, defamation, and false light privacy. Court affirmed trial court's grant of summary judgment to defendants. Case contains comparison discussion of defamation and false light claims.)
Fudge v. Penthouse Intern., Ltd., 840 F.2d 1012 (1st Cir. 1988). (Where principal had separated recess periods by gender, because girls were intimidating boys on playground, Penthouse magazine reprinted one-paragraph newspaper item with the headline "Little Amazons Attack Boys." Girls sued Penthouse for defamation, IIED, and false light privacy. Court affirmed dismissal, holding that in context one could not reasonably perceive that schoolgirls had an association with Penthouse, consented or endorsed their portrayal in the magazine.)
Walko v. Kean College of New Jersey, 561 A.2d 680 (N.J.Super. 1988). (Where student newspaper staff ran spoof version of newspaper advertisement for Hotline, retitled "Whoreline" and advertised good phone sex with the names of students and faculty members, plaintiffs sued for IIED, defamation, loss of consortium, and false light privacy. Court affirmed summary judgment for defendants on all claims.)
Strickland v. University of Scranton, 700 A.2d 979 (Pa.Super. 1997). (Where university administrator was given $19,000 for investment by widow of fellow faculty member and eventually was prosecuted for theft, a local newspaper published an article recanting the claimed theft and eventual settlement. The university administrator brought a false light claim against the widow and university. Court held that there was no evidence that the university or the widow controlled the content of the news articles, and that there was no evidence that the suit was not a matter of public concern.)
Kumaran v. Brotman, 617 N.E.2d 191 (Ill.App. 1993). (Where newspaper published article concerning litigious behavior of substitute teacher and security guard, teacher/guard sued reporter, newspaper and two attorneys quoted in the article for defamation and false light privacy. The circuit court dismissed the complaint but the appellate court reversed and remanded, granting leave to amend his complaint on the false light claim.
Kish v. Iowa Central Community College, 142 F.Supp.2d 1084 (N.D.Iowa 2001). (Where college removed coach from coaching position and issued press release to that fact, coach sued college for breach of contract, due process violation, and false light privacy violation. The court granted summary judgment to the college on all claims. On the false light claim, plaintiff failed to show the element of damages.)
Harris v. District Board of Trustees of Polk Community College, 9 F.Supp.2d 1319 (M.D.Fla. 1998). (Where coordinators in criminal justice program claimed discharge in retaliation for their whistleblowing activities and sued the college under a variety of theories, including 1st Amendment, Section 1983, and false light privacy violation, the court denied the college's motion to dismiss on the privacy claim. The court sent that claim back for a determination if a university administrator's comment to the press that the coordinators were "part of the problem" about which they were whistleblowing was made with knowledge of or in reckless disregard to its falsity.)
Grossman v. Smart, 807 F.Supp. 1404 (C.D.Ill. 1992). (Where assistant professor of law and members of hiring committee brought defamation actions and two privacy claims against university officials from allegedly false representations concerning the professor's fitness and integrity, the court denied summary judgment on the false light claim but granted summary judgment on the public disclosure claim. The matters involving the professor were issues of public concern.)
Motzkin v. Trustees of Boston University, 938 F.Supp. 983 (D.Mass. 1996). (Where former professor brought breach of contract, disability discrimination, defamation, and false light privacy claims, the court held that false light claims arising from statements made in court process have absolute privilege.)
Closs v. Goose Creek Consolidated Independent School Dist., 874 S.W.2d 859 (Tex.App. 1994). (Where former school employee brought malicious prosecution, tortuous interference with contract, civil conspiracy, and false light privacy claims against the school district and others who had investigated criminal charges against him after he was terminated for theft of school property, the court affirmed summary judgment on the false light claim on the basis of immunity.)
Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988). (Where attorney/participant in Christian radio talk show said that sex ed teacher derived sexual gratification by teaching about sexual subjects, teacher sued participant for false light privacy. The district court entered in directed verdict for the defendant after a jury awarded actual and punitive damages. On appeal, the court agree with the district court.)
Godby v. Montgomery County Board of Education, 996 F.Supp. 1390 (M.D.Ala. 1998). (Where biracial junior high student was made to choose whether she was African-American or Caucasian because of separate homecoming queen competitions, and facts became disputed within the community, the student sued the school district when it offered its version of the facts in the dispute. The court held that offering

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the school's versions of the event was not false light privacy claim; plaintiff made it public, and no evidence of falsity of the information; no evidence of reckless or knowing of falsity of the information.)

D. Appropriation of Name or Image

Felsher v. University of Evansville, 727 N.E.2d 783 (Ind.App. 2000). (Where former professor created web-sites appearing to be university's web-sites, created email accounts appearing to be university officials' email accounts, posted his views about the officials' shortcomings on the web-sites, nominated the officials for positions elsewhere, and directed search committees' attention to the web-sites, the university successfully received a permanent injunction against the former professor. The appellate court affirmed the injunction. Usually a corporation cannot bring a claim for violation of privacy because it cannot have hurt feelings, but here, the court ruled that the university could have a claim for appropriation of image as a property right. Also, employees had a claim for appropriation of name and image on a web-site.)

Tannenbaum v. Grady, 604 N.E.2d 16 (Mass. 1992). (Where toxicology professor sued a personal injury lawyer for appropriation of name in answering interrogatory on whom he had contacted to serve as an expert witness. The professor was not chosen as an expert witness, thus he felt his name was being used to force a settlement. The court affirmed the lower court ruling that this was not an appropriation situation, because the attorney/defendant's disclosure was truthful and not for the purposes of trade, as required for the claim under Mass. law.)

Nemani v. St. Louis University, 33 S.W.3d 184 (Mo. 2000) *en banc*. (Where university submitted a grant using the assistant research professor's name as a participant in the grant without his express knowledge or consent, and the trial court entered a jury award of $300,000 to the professor, the supreme court reversed. The court held that the professor had impliedly consented to the university's use of his name in applications for research grants, through a "collaborative research"clause in his contract.)

Armada Broadcasting v. Stirn, 516 N.W.2d 357 (Wis. 1994). (Where broadcaster sued to see a report the school district had prepared in connection with an investigation of alleged sexual harassment by an employee, the employee sought to intervene. The trial court denied. On appeal, the supreme court granted the right to intervene, recognizing a privacy interest in the report. The court did not decide whether the privacy right outweighed the public right to know; only granted the right to intervene.)

Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (C.D.Cal. 1996). (Where school district policy prohibited critical comments about employees by citizens at school board meeting during "community comment" portion of board agenda, citizen sought preliminary injunction against operation of the policy. Court held that the policy was not justified by the need to protect the privacy interest of employees; not a compelling governmental interest.)

III. Observations

A. Privacy claims involving schools and school personnel have accelerated since 1985. *See*, Clevenger v. Baker Voorhis & Co., 199 N.Y.S.2d 358 (N.Y.A.D. 1956) (use of name on legal treatise); University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp., 256 N.Y.S.2d 301 (N.Y.A.D. 1965) (use of name in book and movie); Klein v. McGraw-Hill, Inc., 263 F.Supp. 919 (D.D.C. 1966) (use of picture of radio personage for frontispiece of radio textbook); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971), cert. denied 92 S.Ct. 342 (haircut policy); Rumler v. Board of School Trustees for LexingtonCounty Dist. No. One Schools, 327 F.Supp. 729 (D.S.C. 1971) (haircut policy); Blaire v. Union Free School Dist., 324 N.Y.S.2d 222 (N.Y.Dist.Ct. 1971) (use of name and picture on student publication); Pitcher v. Iberia Parish School Bd., 280 So.2d 603, (La.App. 1973) (teacher physical exam); Jerry v. Board of Ed. of City School Dist. of City of Syracuse, 324 N.E.2d 106 (N.Y. 1974) (discipline of teacher who slept with 18 year old recent graduate); Wallace v. Weiss, 372 N.Y.S.2d 416 (N.Y.Super. 1975) (student's picture on student magazine); Porten v. University of San Francisco, 134 Cal.Rptr. 839 (Cal.App. 1976); Graves v. Duganne, 581 F.2d 222, rehearing, 620 F.2d 749 (9th Cir. 1978) (contract non-renewal for teacher's out-of-school activities), Garrett v. Los Angeles City Unified School Dist., 172 Cal.Rptr. 170 (Cal.App. 1981) (chest x-ray for employment); Golden v. Board of Educ. of Harrison County, 285 S.E.2d 664 (W.Va. 1981) (failure to show nexus test on immorality charge).

B. Common law privacy types of claims involve both common law and statutory law in many states.

C. As in all tort claims, one set of fact patterns can elicit multiple tort claims.

D. Common law privacy may interact with other forms of privacy (constitutional and statutory).

E. Analysis by courts usually tilt in favor of a public interest, if one can possibly be located.

IV. Observations and advice to school and university personnel

A. Concern about the use of video and other images should not be confined to the simple act of shooting the video or photograph. More claims come from what happens to the video or film later.

B. Investigations by administrative personnel of wrongdoing by students or teachers are by their nature intrusive, but usually not a violation of privacy (intrusion on seclusion).

C. Involvement of faculty in investigations of wrong-doing, under the guise of "faculty governance," invite intrusion and public disclosure claims. School administrators must lead investigations and keep a firm control over their conduct and course.

D. School officials are often placed in the political position where they must balance their perceptions of another person's right to privacy and the school's interest in telling its side of a story. Once the other side goes public, courts tend to be forgiving of school officials who provide an alternative version of events.

E. Parallels exist between sexual harassment under Title VII and intrusion on seclusion claims. Note that hostile work environment sexual harassment requires severity, pervasiveness, subjective objection, and objective objection. One statement, no matter how objectionable, probably cannot be actionable under Title VII; one rape is actionable. Where sexual statements may not be intrusion on seclusion, sexual assaults are. Intrusion on seclusion could become a replacement claim to the VAWA.

F. Because of the distinction between "publication" in a defamation claim and "publicity" in public disclosure of a private fact claim, disclosure to those with a need to know during and subsequent to an investigation cannot be a privacy claim (though it may be a defamation). School officials need to be clear about who needs to know information and what is the truth.

G. The earliest successful common law privacy cases grew out of publications by newspapers, magazines, films, and other media. With the increasing use of web-based instruction in colleges and schools, the parallels are obvious. School personnel must take great care and oversight in postings on school servers. The most likely privacy claims in web-based scenarios seems to be false light and appropriation claims.

THE INTERNET AND ACADEMIC FREEDOM: THE IMPLICATIONS OF *UROFSKY V. GILMORE*

PART 1: IMPLICATIONS FOR ACADEMIC FREEDOM AND INSTITUTIONAL CONTROL

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LAKE TAHOE MARCH 2002

Introduction:

The Fourth Circuit ruling in *Urofsky v. Gilmore*, recently declined for review by the Supreme Court, is one of the most important and controversial decisions affecting Higher Education and the First Amendment in recent years. This joint presentation will seek to address several of these issues. *Urofsky* may present the most fully developed caselaw yet on the application of academic freedom to the Internet in higher education. It would appear to soundly answer certain questions regarding the authority of college and university administrators to regulate the access of their professors and other employees to the Internet while using state funded facilities and computers. In addition, the *Urofsky* decision has questioned the application of academic freedom law as traditionally conceived. In its decision the Fourth Circuit has reinterpreted or rejected such precedents as *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*. By addressing academic freedom as an institutional right, as opposed to its traditional treatment as an individual right, the Fourth Circuit has called into question both precedents and traditional assumptions regarding the application of academic freedom. Finally, in the second part of this presentation, the question of standing, specifically of state university faculty, to challenge such statutory regulations of their employers and legislatures will be addressed.

Part 1: Implications for Academic Freedom and Institutional Control

The Fourth Circuit ruling in *Urofsky v. Gilmore*, 216 F.3d 401, 145 Ed.Law Rep. 582 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 759 (2001) has raised numerous issues related to the application of the First Amendment to the Internet in an academic setting and the concept of academic freedom in general. This litigation is concerned with Virginia's act entitled

"Restrictions on State Employee Access to Information Infrastructure." (Va.Code § 2.1-804, *et seq.*) This legislation essentially forbids Virginia employees, including college faculty, from utilizing state owned or leased computers to access sexually explicit web-sites in the Internet. The law does allow exceptions for the State Police and for employees conducting legitimate academic work, such as teaching or research. The second exception requires the approval of an agency supervisor and gives such administrators exclusive control to grant exceptions.

The law was initially challenged by a several faculty members at Virginia universities who claimed the law interfered with their academic freedom and their ability to pursue legitimate academic work. The primary named plaintiff, for example, claimed that the act made it impossible for him to review assignments of students who researched topics in human sexuality on the web. Other faculty noted concerns in research or presenting material related to topics such as the psychology of human sexuality, gay and lesbian studies, and Victorian poetry. Although each of the plaintiffs complained that the law interfered with their academic work, the Fourth Circuit later noted that none of the faculty members had formally requested an exemption as provided by the law and, since the law was enacted, no request for an exemption has been refused.

Initially, the Circuit court overturned the ruling of the district court, *Urofsky v. Allen*, 995 F.Supp. 634 (E.D.Va. 1998), which had granted summary judgment to the plaintiffs, several state university professors. The professors had sought injunction against the Commonwealth of Virginia's new statute limiting their access to sexually explicit websites (Va.Code Ann. §§ 2.1-804 to –806). The professors argued that the restrictions impaired their academic freedom by limiting their ability to perform legitimate research. The district court accepted this argument and also found that the regulations were both over and under inclusive, and therefore

unconstitutionally vague and overbroad. The court also rejected the contention that the policy was necessary to promote workplace efficiency, under *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), or to prevent hostile environment claims under Title VII or Title IX. The court determined, based on past incidents cited by the Commonwealth, that alternate mechanisms already were adequate to deal with such incidents without the need for a blanket policy.

The district court also cited numerous deficiencies in the operation of the act itself. It noted the sweeping nature of the ban, including nudity and torture, would preclude access to internet sites dealing with AIDS prevention or the history of political repression in Argentina. The act would even prevent access to numerous works of literature, art, and humanities on VIVA, the Commonwealth's own on-line library system. The court was also troubled that the prior approval provision of the act, which allows access to explicit sites for *bona fide* research and educational purposes, gave unfettered discretion to agency administrators. Not only did this empower educational leaders to censor at will, it also created numerous difficulties in efficient public administration of these institutions, in theory a goal of the act. The court found that the Health Sciences Center at the University of Virginia had to be granted a blanket permission to view explicit sites necessary to promote medical research and training.

A panel of the Fourth Circuit, in *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), reversed the district court. The appellate court held, on appeal, that the speech at issue did not constitute a matter of public concern, as defined in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. (1994). Additionally, the court found the Commonwealth to be well within its powers to limit its employees in their use of state provided equipment and facilities. Taking a fairly limited approach, the appellate court determined that the act dealt with employees in their role as employees, and not as citizens

speaking on matters of public concern. It noted that employees, including the plaintiffs, were free to request exemptions from their supervisors, or utilize computers neither owned nor leased by the Commonwealth. Applying *Waters* and *Connick*, the panel found that the Commonwealth could legitimately dictate how its employees utilized its equipment and their activities when acting as public employees.

In its *en banc* review, the entire Fourth Circuit upheld the reversal by the trial court but for more extensive reasons. The court, explicitly rejecting commonly interpreted precedents such as *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203 (1957) and *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967), held that the First Amendment did not extend any special or additional protection to college faculty under the concept of "Academic Freedom." Going further than the issue of determining the protected nature of the speech and the state's interest in regulating its facilities, the full appellate court held that any legal concept of academic freedom, if one could be established, belonged to the institution as a whole, and not to any particular individual.

In making this ruling, the Fourth Circuit engaged in a very selective review of Academic Freedom caselaw. Despite the negative outcome of that case, the Fourth Circuit placed great reliance on *University of Pennsylvania v. EEOC*, 493 U.S. 182, 110 S.Ct. 577 (1990) in asserting that academic freedom was a right that belonged to an institution, not to individual faculty members. "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs." The court then proceeded to engage in a detailed review of the history of academic freedom and Supreme Court precedent on the subject. The Fourth Circuit purposely

undertook a selective review of this precedent in an effort to completely undermine the very concept of academic freedom as a constitutional right.

Dealing with the initial determination in *Sweezy* that Academic Freedom is a "special concern of the First Amendment," the court dismissed this language, and the *Sweezy* majority's assertion that, "Teachers. . .must always remain free to inquire, to study, and to evaluate, . . .," as a mere "paean" to Academic Freedom. It rejected the majority opinion in *Sweezy* as essentially prose and noted that the Court's reliance on due process concerns in *Sweezy* rendered any First Amendment discussions as being purely anecdotal and non-binding. In a similar manner, the Fourth Circuit dismissed the plaintiffs' reliance on *Keyishian*. It found that that case, like *Sweezy* and other rulings, dealt with employee's speech as citizens. The court also found that *Keyishian*, in which an individual professor prevailed against the Board of Regents that acted as his employer, could actually be interpreted as granting Academic Freedom to the institution. Incredibly, the Fourth Circuit concluded that the First Amendment, enacted to protect the rights of citizens to speak freely without fear of the state, granted its Academic Freedom protection not to individual educators but to the state institutions that employed them.

When combined with its previous ruling is *Boring v. Buncombe*, 136 F.3d 364 (4th Cir. 1998), the Fourth Circuit's decision in *Urofsky* raises serious questions regarding the future application of academic freedom law. The contention of the authors is that the circuit court has drawn an extremely narrow interpretation of First Amendment and academic freedom law that is not consistent with Supreme Court precedent and the interpretations of other circuits. Furthermore, not only have these recent Fourth Circuit decisions selectively applied precedents, but that the circuit court also erred in interpreting a right, established under the First Amendment, as an institutional right. The contention of the authors is that the Supreme Court

established academic freedom as a "special concern" of the First Amendment in *Sweezy*. As such, any right derived from the First Amendment, or the Bill of Rights in general, represent a right held by individuals. This analysis places the final aspect of the Fourth Circuit's, regarding the institutional right of academic freedom, at odds with commonly accepted interpretations of both academic freedom caselaw and constitutional rights.

A separate issue, more fully raised by the initial Fourth Circuit panel in *Urofsky*, is the question of administrative control as regards the utilization of state owned and provided equipment and facilities. In this regard it can be concluded, on a much simpler basis, that the Commonwealth's restrictions are reasonable and justified. By referring to decisions such as *McElearney v. University of Illinois*, 612 F.2d 285 (7th Cir. 1979) and *Day v. Board of Regents of University of Nebraska*, 911 F.Supp. 1228 (D.Neb. 1995), it can be established that any doctrine of academic freedom does not supersede the right of public employers to restrict the use of their facilities and equipment by their employees. Although the appellate decision in *Urofsky* may be scrutinized and criticized for its controversial, and possibly unnecessary, interpretation of academic freedom caselaw, it remains a powerful precedent in upholding the right of academic institutions and other public agencies to regulate the utilization of their facilities. *Urofsky* establishes that educational institutions clearly have the authority to restrict the access of employees, or others, to both the Internet in general and to specific categories of websites and materials.

Students' Rights of Privacy in the Digital Age

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March 21-24, 2002

I. Introduction

Students' rights of privacy in public schools are typically measured against the substantial interest of school officials so as to protect the health, safety, and welfare of other students and staff, especially where violent behavior is suspected. There is some question as to the expanse of the "police power" of school personnel, however, particularly in the digital age. Important questions are raised, for example, as to a student's right of privacy for the use of school computers, home computers, email, chat rooms, and other digital communication which students both intend and do not intend to reach the environment of the school. School districts must see such authority in the digital age as being on a very fluid continuum, understanding current law, and preparing to meet new and dynamic demands.

II. An Intent to Protect

A. A Constitutional Intent to Protect

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. A Judicial Intent to Protect

Rakas v. Illinois, 439 U.S. 128, 143 (1978).

A search has taken place for Fourth Amendment purposes if an individual has a "legitimate expectation of privacy" in an item that is examined.

Minnesota v. Olson, 495 U.S. 91, 95 (1990).

An individual's expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable."

Katz v. United States, 389 U.S. 347 (1967).

Warrantless searches, even with proof of probable cause, are generally deemed to be unreasonable, because they may infringe upon a person's expectation of privacy.

Gouled v. United States, 255 U.S. 298 (1921)

The Fourth Amendment expectation of privacy is recognized when an individual mails a letter.

New Jersey v. T.L.O., 469 U.S. 325 (1985).

"*Schoolchildren have legitimate expectations of privacy.* They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds."

C. A Common Law Intent to Protect

1. *Invasion of Privacy is the name given to a family of closely related common-law causes of action under the law of tort. A claim for invasion of privacy exists under any of the following circumstances:*

a. Intrusion - "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of ... privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B.

If private facts which would not otherwise be of legitimate concern to the public are disclosed in a manner that would be deemed highly offensive to a reasonable person.

b. Misappropriation of Name or Likeness - "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."
Restatement (Second) of Torts § 652C.

If one's name or likeness is appropriated without permission for another's benefit.

c. Public Disclosure of Private Facts - "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: 1) would be highly offensive to a reasonable person; and 2) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D.

If information or activities that one has held private are communicated or published to third parties.

d. False Light - "One who gives publicity to a matter concerning another that places the other before the public in false light is subject to liability to the other for invasion of his privacy, if: 1) the false light in which the other was placed would be highly offensive to a

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reasonable person; and 2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts § 652E.

If one is subject to publicity that places one in a false light in the public eye.

D. Statutory Intent to Protect

Stored Communications Act, 18 U.S.C. § 2701

Prohibits unauthorized access to electronic communications that are in storage while in transit from sender to recipient.

Computer Fraud and Abuse Act, 18 U.S.C. § 1030

Prohibits the intentional access of a computer or computer system without prior authorization.

Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.*

Makes it unlawful to intercept any electronic communication, or to intentionally disclose any electronic communication known to have been obtained by unlawful interception. Here, Congress extended the provisions of the Federal Wiretap Act to include "electronic communications", which it defined generally as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce."

Communications Decency Act (CDA), 47 U.S.C. §§ 223(a)(1)(B) and 223 (d)(1).

The purpose of the CDA was to protect minors from obscene, indecent or patently offensive Internet material and to impose criminal and civil penalties on knowing creators and transmitters of such material.

The Children's On-Line Protection Act (COPA), 47 U.S.C. § 231 *et.seq*

The COPA was designed to prohibit an individual or an entity from:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors

The Children's Internet Protection Act (CIPA), 20 U.S.C. §§ 7001, 9134

The Act conditions schools' and libraries' receipt of federal funds earmarked for education technology on the installation of filtering software that will keep harmful web sites away from children age 17 or younger.

Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, *et.seq*

The Act gives parents and students access to student records and prevents dissemination of student record information to unauthorized third parties.

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The above inexhaustive list of legal support might give the impression of a firmly settled and convincing foundation for the promotion of individual rights. In fact, the vigorous debate surrounding such rights would suggest that the right of privacy in its statutory and common law expanse is as porous as the 4th Amendment Constitutional platform on which it stands. With both students and citizens outside the school, arguments are made that there are extenuating circumstances that require the increase of authority to governmental actors to so as to respond to inappropriate behavior, and perhaps even dangerous or illegal behavior. The line of cases extant to date would suggest that students, as well as common citizens, are facing an enduring diminished expectation of privacy.

III. Constitutional Expectation of Privacy

A. No Expectation of Privacy

White v. White, 344 N.J.Super. 211, 781 A.2d 85 (N.J. Super. Ct. 2001)

A person's expectation of privacy to a room used for storage and to which others have keys and access is not reasonable. A person's subjective belief that the room was private is irrelevant.

Bohach v. City of Reno, 932 F.Supp.1232, 1236 (D.Nev.1996)

No objectively reasonable expectation of privacy exists in a computer system that was installed to allow only for restricted communications.

United States v. Maxwell, 50 M.J. 550 (A.F.C.C. A. 1999).

A user of government computers does not acquire a reasonable expectation of privacy in government property designated or assigned for official purposes

Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).

A federal appeals court determined that:1) a school locker is not the property of the student who occupies it for the school year; 2) the school controlled and maintained access to all student lockers; 3) the school maintained master keys and a file of locker combinations; and 4) the school informed its students of the school regulations concerning lockers, the court determined that the high school student did not have a legitimate expectation of privacy in h/her locker.

In re Patrick Y., 358 Md. 50, 746 A.2d 405 (2000).

A state supreme court concluded a student accused of having a dangerous weapon and evidence of drugs did not have a reasonable expectation of privacy in his locker despite a school policy that required probable cause to initiate a locker search. Rather than relying on the school's policy, the court based its holding on a state statute that permits school officials to search lockers without probable cause or reasonable suspicion as they would any other school property.

In re Isiah B., 500 N.W.2d 637 (Wis. 1993).

A state supreme court held that a student had no reasonable expectation of privacy in his locker when school policy reserved the right to search lockers at any time and for any reason without prior notice

Shoemaker v. State, 971 S.W.2d 178 (Tex. App. 1998)

A state appeals court found that a student did not have a reasonable expectation of privacy in his locker when a school policy stated that school officials may conduct locker searches when they have reasonable cause to do so

By analogy students may not have a legitimate expectation of privacy in a school computer or a school email account.

B. A Reasonable Expectation of Privacy

New Jersey v. T.L.O., 469 U.S. 325 (1985).

Intrusions by school officials on the constitutionally protected privacy interests of school children for noninvestigatory, school related purposes, as well as for investigations of school-related misconduct, should be judged under a reasonableness standard.

In assessing the reasonableness of the search of a student, a court will determine whether the search was justified at its inception and whether the search was reasonably related in scope to the circumstances that justified the search. Typically, reasonable grounds that a search will result in evidence of a violation of law or school policy will justify the search at its inception and the

scope of the search will be permissible if the method utilized was reasonably related to the objectives of the search and was not excessively intrusive in light of the age and sex of the student.

Commonwealth v. Snyder, 597 N.E.2d 1363, 1366 (Mass. 1992)

State supreme court held that, where school policy explicitly provided that students had the right not to have their "locker subjected to unreasonable search," those "students [had] a reasonable and protected expectation of privacy in their school lockers".

In re S.C. v. State, 583 So. 2d 188, 191-92 (Miss. 1991)

State supreme court held that, under the Mississippi state constitution, students have a reasonable expectation of privacy in their lockers, (citing Miss Const. art. 3, § 23).

In re Dumas, 515 A.2d 984, 985-86 (Pa. Super. Ct. 1986)

A state appeals court extended the Supreme Court's recognition in T.L.O. of students' legitimate expectation of privacy in items that they bring to school and put in their lockers.

State v. Joseph T., 336 S.E.2d 728, 737 (W. Va. 1985)

A state supreme court upheld a school policy which stated that students "may reasonably expect that their lockers will not be searched unless appropriate school officials consider a search absolutely necessary to maintain the integrity of the school environment and to protect other students".

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000).

Swimming coach asked team member to take a pregnancy test. A federal appeals court ruled that coach's knowledge and duties did not extend to determining medical condition of student and her condition was not suitable for public speculation. Also coach should have known his conduct would violate a clearly established right and, hence, he was not shielded by qualified immunity. The court reasoned that school officials are shielded if the performed discretionary functions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

While the courts yet to review the privacy characteristics of the electronic media in a school setting, one court has held that under some circumstances users of email have an expectation of privacy in email transmissions for Fourth Amendment purposes.

United States v. Maxwell, 45 M.J. 406 (1996).

An Air Force colonel was faced with court martial for sending and receiving child pornography via email. He operated his email when he was off duty through a personal computer and an America Online (AOL) subscription the colonel purchased with personal funds. The court agreed that under the conditions of using a private account on one's own time, in the absence of a policy otherwise, a person may have a reasonable expectation of privacy.

United States v. Butler, 931 F.Supp. 276 (S.D.N.Y. 1996).

A student left a pornographic image frozen on a school computer. The incident led to an investigation by University officials which revealed more such images on other hard drives of school computers the student used. The student complained this was the product of an illegal search. The court ruled against the student finding that the university kept a session log record of activity over its computers and users had the responsibility of knowing this public policy. Moreover, the university had not created computer privacy policies and there was no proof that the school had made any presentations about privacy protection. Therefore, reasonable grounds existed for the search since school officials could point to the important objective of preventing use of computers for the illegal purpose of downloading child pornography.

C. A Diminished Expectation of Privacy

New Jersey v. T.L.O., 469 U.S. 325 (1985).

Although students have legitimate expectation of privacy in general, these interests must be balanced against the school's special need to maintain a proper learning environment and to control discipline. The proper educational environment requires closer supervision of school children as well as the enforcement of rules against conduct that would otherwise be permissible if undertaken by an adult. "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally." at 348.

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)

Inasmuch as public school students are "committed to the temporary custody of the State as schoolmaster," school officials "may exercise a degree of supervision and control greater than it could exercise over free adults. Special needs exist in the public school context and, as such, "public school children ... have a lesser privacy expectation ... than the general population. Student athletes have even less of a legitimate privacy expectation, for "an element of communal undress is inherent in athletic participation, and athletes are ... subject to preseason physical exams and rules regulating their conduct."

Thompson v. Carthage, 87 F.3d 979 (8th Cir. 1996).

Students have a diminished expectation of privacy when special needs exist in the public school in the context of "danger" sufficient to warrant sweep searches.

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998)

Band members are likely as athletes to take leadership roles; it follows that it is appropriate to include all students participating in extracurricular activities so as to protect the special need of "health" and to support school authority to deter conduct that could substantially disrupt the school environment.

Earls v. Board of Educ./Tecumseh Pub. Sch. Dist., 242 F.3d 1262 (10th Cir. 2001), *cert. granted,* Board of Educ. of Indep. Sch. District No. 92 of Pottawatomie v. Earls, 122 S.Ct. 509 (2001)

The court rejected the argument that voluntary participation in any extracurricular activity reduces a student's expectation of privacy in that activity. The court found the school district policy for suspicionless searches was inappropriate as there was little evidence of an identifiable problem among a sufficient number of students so as to demonstrate a special need.

Ianson v. Zion-benton Township High School, 2001 WL 185021 (N.D. Ill).

A security guard detained and interrogated high school students in connection with pirated and/or pilfered school software and/or programs. A federal district court held this on-campus search to be reasonable "in light of the special relationship between teachers and students, the diminished protection of the Fourth Amendment for public schoolchildren and [the] need to maintain discipline and order in the schools." at *3

But,

Official activity, however, was not confined to school boundaries. The school security guard was accused of entering each of the students' homes without a warrant, and seizing their personal computers. School personnel argued unsuccessfully that the decision in T.L.O. extended beyond the walls of the school. The court responded by stating that the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home must be strictly circumscribed. The fact that students are involved does not mean that school authority has any extension to home computers.

IV. Common Law Expectation of Privacy

A. Intrusion

Smyth v. Pillsbury Company, 914 F.Supp. 97 (E.D. Pa. 1996)

An employee of the Pillsbury Company was fired for allegedly sending a threatening, internal

email to his supervisor. He sued under the "intrusion" theory of invasion of privacy, arguing that the company had assured its employees that email communication was confidential. The court found that a dispatched email has no expectation of privacy and no reasonable person would consider the employer's interception of email to be a substantial and highly offensive invasion of privacy. The employer is not requiring the employee to disclose any personal information and is not invading the employee's person or property. In addition, the company's interest in preventing inappropriate and unprofessional comments or illegal activity in its email system outweighs any employee privacy interest.

McLaren v. Microsoft Corporation, 1999 WL 339015 (Tex.App.-Dallas)

An employee's computer was accessed by company officials during an investigation of sexual harassment charges against him; he was later terminated. Based on the "intrusion" theory of invasion of privacy, he charged that his email files were password protected and that it was unlawful for the employer to "decrypt" his personal store password so as to gain access. The court stated that email messages stored in company owned computers were not the employee's personal property, but merely "an inherent part of the office environment". Moreover, the creation of a personal password, by itself, does not create a reasonable expectation of privacy in email that would preclude company review.

TBG Insurance Services Corporation v. Zieminski, 2002 WL 254139 (Ct. App. 2d Dist. Calif.)

A company executive was terminated for using a computer, against corporate policy, for improper, derogatory, defamatory, obscene or other inappropriate purposes. The court ruled that an invasion of policy claim must be viewed within "acceptable community norms." Community norms for a 21st century company include the company's authority to monitor, record, and review employee communications and activities on the job, including telephone calls, e-mails, Internet connections, and computer files. The use of computers in this employment context carries with it social norms that effectively diminish the employee's reasonable expectation of privacy with regard to his use of his employer's computers. TBG had an acceptable use policy, which the employee signed, limiting all computer use to company business.

B. Misappropriation of Name or Likeness

Felsher v. University of Evansville, 755 N.E.2d 589 (Ind. 2001)

A terminated university professor created phony email addresses and webpages for university administrators and then preceded to nominate them for positions around the country. The university, and the administrators as individuals brought claims of invasion of privacy. The Indiana Supreme Court ruled that the university has no right of privacy inasmuch as it is a corporate entity. The Restatement of Torts § 652I, comment c states, "[a] corporation,

partnership, or unincorporated association has no personal right of privacy". The individual claims of the university administrators calling for an injunction against the professor were upheld since, even though the email addresses and websites had been removed, a "reasonable inference" could be drawn that the professor could or would create them again. The scope of the injunction was narrowed, however, since, the professor was only prohibited from creating phony websites and email addresses. He could still nominate the administrators for positions under his own name.

V. Statutory Protection

A. Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 *et seq.*

Exceptions:

1. Public Access: It is *lawful* for a person to intercept or access electronic communication if the communication is made through a system that "is readily accessible to the general public." Example: when an email is posted on an on-line chat group, a public web-page, or a generally accessible bulletin board and a second computer user reads the first user's posting. 18 U.S.C. § 2511(2)(g)(i).

J.S. v. Bethlehem Area School District, 757 A.2d 412 (Pa. Commw. Ct. 2000).

> A student was expelled after creating, at home, an Internet Web site containing threatening and derogatory comments and pictures about his principal and one of his teachers. Among other things, the student claimed an invasion of privacy because school officials accessed his website. The court explained in its ruling that the student website was not protected inasmuch as its viewership was not limited, i.e., "any user who happened upon the correct search terms could have stumbled upon Student's web-site". The creator of a web-site controls the site until such time as it is posted on the Internet. Once it is posted, the creator loses control of the web-site's destiny and it may be accessed by anyone on the Internet.

2. Employer-owned system: an employer may assign to employees or agents the task of monitoring electronic communications if necessary to the provisions of computer services or the protection of computer equipment. *The ECPA thus gives public schools the authority to monitor email files maintained by students, faculty and staff.*

In re Doubleclick Inc. Privacy Litigation, 154 F.Supp.2d 497 (S.D.N.Y. 2001)

> A district court has ruled that the placement of "cookies" by a "user" on computer hard drives to track Web surfing activities does

not violate privacy. A New York federal district court ruled that DoubleClick is a user within the meaning of the statute and, hence, the exception applies.

It is important to note that even if the court would have found no exception for DoubleClick this would not apply to school districts since none of the restrictive provisions of the ECPA apply to "proprietary providers" including public school districts.

3. Consent: Interception is permitted when one of the parties has given prior consent. Acceptable use policies should incorporate provisions that give school officials broad powers to intercept and monitor computer data traffic. 18 U.S.C. § 2511(2)(d).

United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

A public employee does not have a legitimate expectation of privacy with regard to the record or fruits of his/her Internet use in light of an acceptable use policy. "The policy clearly stated that [the government office] would "audit, inspect, and/or monitor' employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, .as deemed appropriate." This policy placed employees on notice that they could not reasonably expect that their Internet activity would be private.

4. Narrow definition of "Intercept." - acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4).

Wesley College v. Pitts, 974 F.Supp. 375 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998). The question in the case was whether the definition of interception is met when text is viewed on a computer screen. No, the screen is just the medium for the information ... Congress had in mind more surreptitious threats to privacy than simply looking over one's shoulder at a computer screen. 974 F.Supp. at 384.

Bohach v. City of Reno, 932 F.Supp.1232, 1236 (D.Nev.1996)

An "electronic communication," by definition, cannot be "intercepted" when it is in "electronic storage," because only "communications" can be "intercepted," and, ... the "electronic storage" of an "electronic communication" is by definition not part of the communication.

B. The Strange Relationship Between the ECPA and FERPA

Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* - unlawful to intercept any electronic communication in transition.

Now see,

Owasso Independent School District v. Falvo, 2002 WL 232853 (U.S.

Files are records under the Act only when and if they "[a]re maintained by an educational agency or institution or by a person acting for such agency or institution." § 1232g(a)(4)(A). First, the student [files] are not, at that stage, "maintained" within the meaning of § 1232g(a)(4)(A). The ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve; retain.

STUDENT'S RIGHT OF PRIVACY IN THE DIGITAL AGE

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* * * *

Education Law Association
Winter Seminar 2002

March 21-24, 2002
Lake Tahoe, Nevada

I. The Ethic of Justice: Balancing Administrative Authority with Individual Rights

Robert Starratt (1991) summarizes the role of the organizational leader within the ethic of justice by asking one primary question: "How shall we govern ourselves?" For the ethical leader, the answer to this question comes in the proper balance between two competing interests: the community and the individual.

A. Benefit Maximization (Administrative Authority)

The first school of thought within Starratt's ethic of justice holds that the primary source of human reality is society. "Participation in the life of the community teaches individuals how to think about their own behavior in terms if the larger common good of the community" (Starratt, p.193). Within this consequentialist theory, decisions are motivated by the maximization of a societal benefit – the best and most just decision is one that produces the greatest good for the greatest number (Strike, Haller, and Soltis, 1998).

B. Equal Respect (Individual Rights)

Within the second school of thought, the individual is the source of moral judgment, where the motivations for decision-making lie primarily in the means and not the ends. Within this non-consequentialist theory, maximization of individual liberty is essential in order to avoid showing any disrespect for persons' dignity that might result from treating them paternalistically (Howe, 1993). The ethical leader must regard as central the fact that people are free and rational moral agents (Strike, Haller, and Soltis, 1998).

C. Legislative and Constitutional Examples

→ Montana Const. Art. II, § 10

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

→ New Hampshire Rev. Stat. Ann. § 91-A:1

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

→ Illinois. § 5 Ill. Comp. Laws 140/1 (2001).

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to the be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government.... Such access is necessary to enable the people to fulfill their duties of discussing public issues freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

[R]estraints on information access should be seen as limited exceptions to the general rule that the people have the right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity.

→ California Const. Art. I, § 1 (The Privacy Initiative, as analyzed in Hill v. NCAA, 865 P.2d 633, 643 (Calif. 1994))

Common experience with the ever-increasing use of computers in contemporary society confirms that the Privacy Initiative was needed and intended to safeguard individual privacy from intrusion by both private and governmental action.

D. The Basic Claim for Invasion of Privacy: A Balancing Act

The primary purpose of the invasion of privacy exemption from the freedom of information is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.

→ Kentucky. Zink v. Commonwealth, 902 S.W.2d 825 (Ky. Ct. App. 1994). A "comparative weighing of antagonistic interests". The privacy interest in non-disclosure is balanced against the policy favoring inspection and openness for the public good.

→ West Virginia. Child Protection Group v. Cline, 350 S.E.2d 541 (W. Va. 1986).

The right of privacy is relative to the customs of the time and place, and is determined by the norm of the ordinary person. To decide whether public disclosure of personal information constitutes an unreasonable invasion of privacy, weigh the following factors:

(1) whether the disclosure will result in an invasion of privacy and, of so, how serious;
(2) the extent or value of the public interest, and the purpose or object of the individuals seeking disclosure;
(3) whether the information is available from other sources;
(4) whether the information was given with an expectation of confidentiality; and
(5) whether it is possible to limit the invasion of privacy and still meet the positive goals of public disclosure.

→ California. Kapellas v. Kofman, 459 P.2d 912 (Calif. 1959).

Publication of private information will be deemed "privileged" if the information reported has previously become part of the "public domain" or the intrusion into an individual's private life is only slight, even though the social utility of the publication may be minimal. When the legitimate public interest is substantial, a much greater intrusion into an individual's private life will be permitted.

II. Applicable Federal Statutes

A. Electronic Communications Privacy Act (18 U.S.C. §§ 2510-2522, 2701-2711)

Thompson v. Johnson County Community College, No. 96-3223, 1997 U.S. App. LEXIS 5832 (10th Cir., March 25, 1997). Security officers employed at a community college challenged the college's use of silent video surveillance cameras. The court held that the ECPA does not cover silent video surveillance. But the Fourth Amendment does. On a Fourth Amendment analysis, the court held that the community college employees had a reasonable expectation of privacy in their lockers, but not in the area surrounding their lockers. Therefore, the use of video surveillance in the locker area was not an invasion of privacy. It made little difference that the security employees worked mainly at night and that the area was not frequented by many people beyond those particular employees.

Thomas v. Pearl, 793 F. Supp. 838 (C.FD. Ill. 1992). University of Illinois basketball player sued assistant coach at University of Iowa after the defendant coach disclosed the contents of a recorded phone call the coach made to the athlete when the athlete was recruited. The player did not know of the recording and claimed a violation of privacy rights. The court held for the defendant. The ECPA says that a person NOT acting under color of law may intercept an wire, oral, or electronic communication where such person is a party to the conversation, unless such interception is made with the intent to violate law. Here, there was no intention on the defendant's part to violate the law.

See also McVeigh v. Cohen, 983 F. Supp. 215 (D.D.C. 1998); Jessup-Morgan v. America Online, Inc., 20 F. Supp.2d 1105 (E.D. Mich. 1998); and Andersen Consulting LLP v. UOP, 991 F. Supp. 1041 (N.D. Ill. 1998).

B. Family Educational Rights and Privacy Act (20 U.S.C. § 1232g)

Owasso Indep. Sch. Dist. No. 1011 v. Falvo, 122 S. Ct. 934 (2002). Under FERPA, peer grading does not violate the privacy rights of children. Teachers do not "maintain" students' grades as "records" (under FERPA) until those grades are recorded in grade books. In addition, the students grading the papers are not acting for an educational institution. Peer grading can be as much a part of the assignment as the content of the assignment itself. Student grades on assignments are not records under FERPA until the teacher has recorded them.

III. State Statutes Explicitly Referencing Technology in Open Records Law

Several states include, in their definitions of "public records", specific references to records generated and stored electronically. Other states praise and encourage the technology-based availability of public records, with some caution.

→ Rhode Island Gen. Laws § 38-2-2(4)(i) (2001).

> "Public record" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic mail messages, except specifically for any electronic mail messages of or to elected officials in their official capacities) or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

→ Florida Stat. § 119.01(2) and 119.01(3) (2001).

> "The Legislature finds that, given advancements in technology, providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible."
>
> "The Legislature finds that providing access to public records is a duty of each agency and that automation of public records must not erode the right of access to those records."

→ Georgia. Official Code of Ga. Ann. § 50-18-70(g).

> "At the request of the person, firm, corporation, or other entity requesting such records, records maintained by computer shall be made available where practicable by electronic means, including Internet access, subject to reasonable security restrictions preventing access to non-requested or non-available records."

→ New York. C.L.S. Pub. O § 87 (2001).

> A state agency may deny access to records or portions thereof if the records disclosed "would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures."

→ Arkansas Code Ann. § 25-19-105.

> Information stored on computer tapes is a public record, and the public is entitled to have it in the form in which it is kept. Blaylock v. Staley, 732 S.W.2d 152 (Ark. 1987).

IV. Common Law Invasion of Privacy and its Codification in State Statutory Law

"Each of the four categories of common law invasion of privacy identifies a distinct interest associated with an individual's control of the process or products of his or her personal life. To the extent there is a common denominator among them, it appears to be improper interference (usually by means of observation or communication) with aspects of life consigned to the realm of the 'personal and confidential' by strong and widely shared social norms." Hill v. NCAA, 865 P.2d 633, 647 (Calif. 1994).

A. Public Disclosure of Private Facts

1. Definition and Elements of the Claim

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion or privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not a legitimate concern to the public. Restatement (Second) of Torts § 652D.

Elements: (1) publication or public disclosure of private information about the plaintiff; (2) the matter disclosed is such that a reasonable person would object to having it made public.

Note: There is a newsworthiness defense if the matter is one of public interest, unless the publication is made with malice.

2. Codification in State Statutory Law

There are many statutes here, primarily on the public's right to access government records. Several state statutes seem to mirror (and/or explicitly mention) FERPA.

a. Explicit reference to FERPA:

→ Mich. Comp. Laws § 15.243(2).

> "A public body shall exempt from disclosure information that, if released, would prevent the public body from complying with … the Family Education Rights and privacy Act of 1974."

→ Arkansas Code Ann. § 25-19-105(b)

> "It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter. … (2) education records as defined in the Family Educational Rights and Privacy Act of 1974 …, unless their disclosure is consistent with the provisions of [FERPA]."

See also Colo. Rev. Stat. Sec. 24-72-204; Conn. Gen. Stat. Sec. 1-210(b)(17).

b. Implicit reference to FERPA:

→ New York CLS Pub. O § 87(2)(a) (2001).

> Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records to portions thereof that are specifically exempted from disclosure by state or federal statute.

See also Ga. Code Ann. § 50-18-72(a)(1); Kan. Stat. Ann. § 45-221f(a)(1); Ky. Rev. Stat. § 61.878(1)(k); N.M. Stat. Ann. § 14-2-1(A)(8); Ore. Rev. Stat. § 192.496(4); R.I. Gen. Laws § 38-2-2(4)(S); S.C. Code Ann. § 30-4-40(a)(4); and Wyo. Stat. Ann. § 16-4-203(a)(ii).

c. State-Based Educational Rights and Privacy Acts

The purposes are similar to those of FERPA: right of access, right to challenge contents of records, right to a hearing on the challenge, and right to privacy.

→ Florida Stat. § 228.093.

> "Records" and "reports" mean any and all official records, files, and data directly relating to students which are created, maintained, and used by public educational institutions, including all material that is incorporated into each student's cumulative record folder and intended for school use or to be available to parties outside the school or school system for legitimate educational or research purposes.
>
> Materials which shall be considered as part of a student's record include, but are not necessarily limited to: identifying data, including a student's social security number; academic work completed; level of achievement records, including grades and standardized achievement test scores; attendance data; scores on standardized intelligence, aptitude, and psychological tests; health data; family background information; teacher or counselor ratings and observations; verified reports of serious or recurrent behavior patterns; and any other evidence, knowledge, or information recorded in any medium, including, but not limited to, handwriting, typewriting, print, magnetic tapes, film, microfilm, and microfiche.
>
> Records and reports do not include "directory information": student's name, address, telephone number if it is listed, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational institution attended.
>
> "Personally identifiable records or reports of a student, and any personal information contained therein, are confidential. ... No state or local educational agency, board, public school, ... shall permit the release of such records, reports, or information without written consent of student's parent or guardian." Release may be granted to:
>
> (1) future schools in which the student seeks to enroll;
> (2) those district employees with legitimate educational or disciplinary interests
> (3) federal agencies with the right of access
> (4) school officials connected to the student's financial aid application
> (5) researchers conducting studies on tests or other instructional programs
> (6) accrediting agencies
> (7) appropriate parties in cases of emergency
> (8) comply with a subpoena or court order, including orders from juvenile court

See also Colo. Rev. Stat. § 24-72-204; and Md. State Gov't Code Ann. § 10-616.

3. Application in Schools

Poway Unif. Sch. Dist. v. The Superior Court of San Diego County, 73 Cal.Rptr.2d 777 (Cal. Ct. App. 1998). Student victim of a hazing incident settled a claim with his school district. At the time, it was the desire of the parties to keep the settlement as confidential as possible. However, a local newspaper sought access, under public records law, to any and all claims filed with the district that dealt with the hazing incidents at the school in recent years. The district denied the request. The newspaper publisher filed for writ of mandate with the trial court, the court granted it, and the district complied. Names, addresses, and phone numbers of victims were omitted from the records. The district then filed a petition with the appeals court asking for published guidance on future similar issues. The court held that releasing the claims forms would not violate the privacy of the victims. There is no expectation of privacy in the tort claims forms filed by a victim. There was also no evidence that the newspaper engaged in any conduct that invaded the privacy of the victim. In fact, the paper has a policy of protecting the identity of minors involved in sex-based crimes. On a FERPA claim, the court held that tort claims forms filed with a school district do not constitute educational records.

Becky v. Butte-Silver Bow Sch. Dist. No. 1, 906 P.2d 193 (Mont. 1995). Parents sought the access to documents related to the denial of their son Robert's membership in the National Honor Society. The district court denied the parents' request and the parents appealed. Under school policy, participation by students and faculty in the NHS is voluntary. Review of applications is done anonymously and confidentially. Evaluation forms are not maintained by the school; in fact, no records are kept by the school that pertain to NHS. Mr. Becky met with the principal, who said that several teachers had rated his son low in certain NHS categories. Names of the teachers were not revealed. Mr. Becky demanded to know, and filed suit. The district sent all of Robert's legally accessible student records to Mr. Becky's attorney. NHS evaluation forms were not included. The Beckys cite to Montana's constitution: "No person shall be deprived of the right to examine documents ... of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure" (Mont. Const. art. II, sec. 9). The court held that while that particular provision of the Montana Constitution applies to school records, the NHS evaluation forms did not qualify as school records for purposes of the applicable law. NHS documents "are generated by an independent non-governmental organization" and are not maintained by the school (at 197). The term "documents of public bodies" is not defined explicitly in the law; but according to the court, it would seem to cover those documents that relate to the functions and duties of a public school district. NHS evaluation forms do not fit within this meaning.

Bowie v. Evanston Comm. Consol. Sch. Dist. No. 65, 538 N.E.2d 557 (Ill. 1989). The issue in this case was whether masked and scrambled test score records which do not identify individual students are subject to disclosure of public records laws. The district agreed to release a report summarizing test performance by school, grade, and race, but did not release individual scores. The trial court held that the district had done all that was required under the FOIA and

dismissed the claims. The appellate court reversed. The district argued that to release individual scores, even without student identifiers would be to create a new non-exempt record under the law; furthermore, it argued that compliance would be unduly burdensome. The court rejected the district's claims. "The public policy of this State encourages a free flow and disclosure of information between government and the people. The FOIA is to be given a liberal construction to achieve this goal" (at 559). The court held that release of masked and scrambled test records will not invade the privacy of students. The district argued that too many identifying variables (e.g., school, grade, gender, and race) would lead to easy identification of some students, even if the records are masked and scrambled. The plaintiffs did not disagree and were not asking for records that would make such identification possible; they did not ask for gender information. Because it was possible here to eliminate identifying information from individual records, the court held in favor of the plaintiffs and their request.

There are a few cases involving the release of statewide exams and their scores and/or individual questions. Phoenix Newspapers, Inc. v. Keegan, 35 P.3d 105 (Ariz. Ct. App. 2001) (release of tests is OK). But see Triplett v. Livingston County Bd. of Educ., 967 S.W.2d 25 (Ky. Ct. App. 1997) (open records act does not authorize the release of standardized examination to parents; individual's interest must be weighed against the state's interest in protecting the integrity of the exam).

Warner v. St. Bernard Parish Sch. Bd., No. 96-1839, 1998 U.S. Dist. LEXIS 1360 (E.D. La. Feb. 4, 1998). Warner wrote letter to her son's teacher, expressing objections to the accuracy of teacher's classroom statements about the Holocaust. The teacher kept the letter in her own personal effects. Almost three years later, excerpts of the letter were released and printed in the local newspaper. At that time, Warner was a candidate for Parish Council. Warner claims that she lost the election and her job because the publication, and filed suit under FERPA. The board countered with an argument that the letter did not constitute an educational record and filed for summary judgment. The district court denied the district's motion for summary judgment. The court made two central points. First, just because the teacher did not place the letter in the student's file and instead took the letter home does not make the letter any less "educational" under FERPA. Second, the letter contained much of the student's "personally identifiable information" which, under FERPA, may not be disclosed without prior consent. The letter's contents were related to Warner's son in that the letter addressed school curriculum with which Warner disagreed.

4. Application to Schools in the Digital Age

Kestenbaum v. Michigan State University, 475 N.W.2d 373 (Mich. Ct. App. 1991). Public disclosure of names and addresses of students at a public university is not an invasion of privacy if the disclosure is for the creation of a student directory, where students have the option, in advance, to have their name and address removed from the directory. Such a directory serves the public interest. On the other hand, release of the same information (here, in the form of computer-ready magnetic tape) to entities desiring to compile political mailing lists does constitute a clearly unwarranted invasion.

City of Kirkland v. Sheehan, No. 01-2-09513-7 (King Co. Super. Ct., May 10, 2001). Defendants operated a web site critical of law enforcement, and contained -- along with political arguments -- lists of names, addresses, birth dates, phone numbers, and Social Security Numbers of law enforcement personnel and their relatives. Against a First Amendment challenge, the court held for the plaintiffs and enjoined the Internet publication of Social Security Numbers. Names, addresses, and phone numbers were obtained legally and are protected as part of defendants' speech. Social Security Numbers have only a distant connection to political speech and their disclosure has potential to cause great harm to the privacy and private lives of the plaintiffs.

President and Trustees of Bates College v. Congregation Beth Abraham, CV-01-21, 2001 Me. Super. LEXIS 22 (Me. Super. Ct., Feb. 13, 2001). The Congregation Beth Abraham serves the Jewish Cultural Community at Bates College, and one of Bates' faculty members (Hochstadt) serves as faculty advisor. Two students had exchanged email messages regarding the allegedly inappropriate conduct of the Congregation's rabbi -- conduct that was allegedly interfering with the relationship between the college and the Congregation. Student A shared one of Student B's email messages with Hochstadt and asked that Hochstadt keep the message confidential. That same day, Hochstadt shared the emails with Leavitt and Shapiro and asked them to keep the message confidential. ("I really didn't have permission to give copies of those letters away, but I thought they were important for you both to know about. So please keep them in your possession, or destroy them when you are finished with them.") The Congregation immediately initiated termination proceedings against Shorr. Bates College policy is to comply with FERPA and filed this action to prevent disclosure of the emails.

The court held that the student emails furnished by Hochstadt are records under FERPA -- contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. The fact that the subject of the emails was a person outside of the college community was not an issue. "The records directly related to the named students and sought the advice and assistance of a person acting for the college" (at *10). It was a violation to disclose the e-mails to Leavitt and Shapiro.

"Although the e-mail correspondence may be a different character than most records, files and documents maintained by an educational institution, the statute does not limit the definition of 'other materials'. As such, that term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act's purpose and intent for the protection of the students" (at *10).

B. Misappropriation of Name or Likeness

1. Definition and Elements of the Claim

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy. Restatement (Second) of Torts § 652C.

Element for the plaintiff to show: unauthorized use by the defendant of plaintiff's picture or name for defendant's commercial advantage.

2. Codification in State Statutory Law

→ Calif. Civ. Code sec. 3344

"Any person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof."

"Photograph" means "any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable."

→ Nebraska. Rev. Stat. Neb. Ann. sec. 20-202.

"Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy."

Exceptions: (1) "Printed, broadcast, telecast, or other news medium or publication as part of any bona fide news report or presentation or noncommercial advertisement having a current or historical public interest and when such name or likeness is not used for commercial advertising purposes." (The second part of this exception applies nicely to web sites of schools). (2) Use for the resale or other distribution of literary, musical, or artistic productions when such person has consented. (3) Incidental use, when subject is merely a member of general public and is not named or otherwise identified.

→ Ohio Rev. Code Ann. sec. 2741.02.

Unless prior consent is obtained, "a person shall not use any aspect of an individual's persona for a commercial purpose during the individual's lifetime or for a period of sixty years after the date of the individual's death."

→ See also Mass. Ann. Laws ch. 214, sec. 3A; N.Y. Civ. Law sec. 50-51; R.I. Gen. Laws sec. 9-1-28.1(a)(2); Va. Code Ann. sec. 8.01-40; and Wis. Stat. sec. 895.50.

3. Application to Schools

Just because the use appears in a publication that contains advertisements does not mean that the use itself is for commercial purposes. (EX: athletic programs, yearbooks, and websites that contain ads may also contain names and likenesses of students without requiring the school to obtain prior consent)

If the use is associated with any news, public affairs, or sports broadcast or account shall not constitute a use that requires prior consent.

A publisher is not liable for uses that are incidental to the purpose of the work, and will be liable only if there is a direct and substantial connection between the appearance of the plaintiff's name or likeness and the main purpose and subject of the work. Williams v. Newsweek, Inc., 63 F.Supp.2d 734 (E.D. Va. 1999), aff'd, 202 F.3d 262 (4th Cir. 1999).

The use must be commercial. Blair v. Union Free Sch. Dist., 324 N.Y.S.2d 222 (1971). See also Wallace v. Weiss, 372 N.Y.S.2d 416 (1975) (student magazine used a photo of a student without prior consent; no violation because the magazine was distributed free of charge and was not published for commercial purposes).

Matters of legitimate public interest may serve as a defense. For example, the use of a photograph of a high school student for a textbook is not a violation of privacy. The use also contained the student's achievements on the subject of the book. Klein v. McGraw-Hill, Inc., 263 F.Supp. 919 (D.D.C. 1966). See also Williams v. Newsweek, Inc., 63 F.Supp.2d 734 (E.D. Va. 1999), aff'd, 202 F.3d 262 (4th Cir. 1999) (newsworthy defense will apply, unless the picture bears no real relationship to the publication).

Dora v. Frontline Video, Inc., 18 Cal. Rptr.2d 790 (Cal. Ct. App. 1993). The court presumed that the Legislature intended "public affairs" to include items that would not necessarily be considered "news". Otherwise, the appearance of one of those terms in the statute would be superfluous. Public affairs may also be presumed to mean something less important than news, but related to real life occurrences. "The public is interested in and constitutionally entitled to know about things, people, and events that affect it."

4. Application to Schools in the Digital Age

   a. School (freely accessible) World Wide Web sites and use of photos/names
   b. Use of non-directory info without sufficient notice or consent
   c. Copying, scanning, cutting and pasting
   d. Promotional publications/videos, multimedia

C. Intrusion into Seclusion or Private Affairs

1. Definition and Elements of the Claim

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. Restatement (Second) or Torts § 652B.

Elements to show: (1) act of prying or intruding by the defendant on the affairs or seclusion of the plaintiff; (2) intrusion is objectionable to a reasonable person; and (3) the thing intruded must be private.

Notes:

- It is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity, or simply the right to be let alone. Gill Curtis Pub. Co., 239 P.2d 630 (Cal. 1952).
- Personal autonomy -- the right and ability of a person to control the privacy of information about himself, such as unauthorized public disclosure of embarrassing or personal facts. It concerns possible abuses in the use of highly personal and intimate information in the hands of government or private parties. State v. Lester, 649 P.2d 346 (Haw. 1982).
- By "private", the law requires that the thing intruded be within the plaintiff's private domain. Private affairs are protected, wherever the plaintiff has the right to be (in a private or a public place). State v. Gibbons, 203 P. 530 (Wash. 1922). Taking pictures of the plaintiff in public is not actionable.

2. Codification in State Statutory Law

→ Nebraska. Rev. Stat. Neb. sec. 20-203.

> "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy."

→ Rhode Island Gen. Laws sec. 9-1-28.1(a)(1)

> In order to recover, a plaintiff must establish that the thing invaded is something that is entitled to be private or would be expected to be private, and that the invasion is offensive to the reasonable person.

→ See also Cal. Civil Code sec. 43; Hawaii Const. Art. I, sec. 6; Ill. Const. Art. I sec. 6. Wash. Const. Art. I sec. 7.

3. Application to Schools

→ General Cases

Bourke v. Nissan Motor Corp., No. B068705 (Cal. Ct. App., July 26, 1993). Plaintiffs were terminated from employment at Nissan and filed suit alleging that their privacy rights had been violated when the employer retrieved and read the contents of email messages sent by plaintiffs on business computers. Specifically, one of the plaintiffs' co-workers was conducting a training session on how email could be used in the workplace, and as an example she randomly chose an email sent by Bourke. That email was of a personal, sexual nature and non-business related. The court held for the employer. Employer's reading of employees' email does not

violate California common law, constitutional law, or privacy statutes. Employees did not have a reasonable expectation of privacy in their email. Nissan employees had signed a Compute User Registration Form, which stated "it is company policy that employees and contractors restrict their use of company-owned computer hardware and software to company business." The employees also had prior notice that the employee-sent emails had been read by people other than the intended recipients. The particular plaintiffs in this case had already been warned about the content of personal emails they had sent from business computers. (See also Eagle Investment Sys. Corp. v. Tamm, 146 F. Supp.2d 105 (D. Mass. 2001) (employee read employer's email; no violation of ECPA).

Persons using private telephone lines have a reasonable expectation of privacy with respect to the telephone numbers of the people they call and the people who call them. They have a reasonable expectation that the government will not tap their private lines without the proper warrant. State v. Rothman, 779 P.2d 1 (Haw. 1989); Black v. City of Honolulu, 112 F.Supp.2d 1041 (D. Haw. 2000); People v. DeLaire, 610 N.E.2d 1277 (Ill. App. Ct. 1993).

Plaintiff failed to state a cause of action for invasion of privacy, where hospital accessed its own computer system to acquire the insurance information necessary to file a claim and did not intrude upon plaintiff's private records. Wilkinson v. Methodist, Richard Young Hosp., 612 N.W.2d 213 (Neb. 2000).

→ School Cases

Iwenofu v. St. Luke Sch., 724 N.E.2d 511 (Ohio Ct. App. 1999). Ted Iwenofu was suspended for three days after engaging in behavior involving inappropriate touching of female classmates at St. Luke School. He was told he could return to school only if he received counseling. His parents maintain that the penalties were too harsh. Among the legal claims, the parents argued that the school was liable for defamation and invasion of privacy. Iwenofu argued that the private school's handbook guaranteed that investigations for such behavior would be conducted confidentially. In this case, one of the school administrators went to Ted's class to investigate the misconduct. She asked several students for information about Ted's alleged misconduct. The court held, however, that the plaintiffs could not maintain an action for intrusion into private affairs. The information sought was of concern to the school and already known to numerous students. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public" (at 520, internal quotation marks omitted).

Sevier County Bd. of Educ. v. Worrell Enterprises, Inc., No. 03A01-9406-CV-00190, 1994 Tenn. App. LEXIS 687 (Tenn. Ct. App. Nov. 30, 1994). Twenty students, ages 14-18, from Gatlinburg-Pittman High School had been caught drinking alcohol on a Spanish Club trip to Cancun, Mexico. The teacher-advisor of the group was suspended for a period of time and each of the students was suspended from regular classes and placed in an alternative learning center for one month. Defendant newspaper wished to publish a photograph of several students attending the disciplinary class. The supervising teacher told the photographer that he could not take the picture. He left the room and returned shortly thereafter to take a picture from a public part of the building through a glass door and glass partition. The district filed for an injunction

to prevent the photo's publication because the photo would be detrimental to the students' privacy rights. The trial court granted the injunction, and the court of appeals reversed. Centrally, the court found that the photograph contained no discernible objects or people. In addition, the court held that the right to privacy is a personal one; a claim for invasion of privacy may be brought only by the person who was the actual subject of the invasion (or by the victim's parents, if the victim is a minor). (What about in loco parentis for the school?)

Munson v. Milwaukee Bd. of Sch. Directors, 969 F.2d (7th Cir. 1992). Suveillance of a school district employee from the public streets and highways by the employer school district agents to determine whether the employee was in violation of the district's residency policy did not violate state privacy law.

See also Doe v. Gonzaga Univ., 24 P.3d 390 (Wash. 2001).

4. Application to Schools in the Digital Age

   a. "Bugging" a room,
   b. Installing surveillance cameras
   c. Intercepting electronic communications (e.g., emails)
   d. Candid photos for newspapers or yearbooks
   e. School searches and investigations of student web sites

Do such actions by a school (for well-intended reasons) create a public domain? Are school buildings and events considered "public" for this purpose, too? What about off-campus email sending and retrieval (e.g., webmail)? This is not "company hardware".

J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000). A middle school student created, at home, an Internet web site containing threatening and derogatory comments and pictures about his principal and one of his teachers. He appealed his school district's decision to permanently expel him, and the court upheld the expulsion against a First Amendment challenge. In a related claim, the court also held that the school district did not violate the student's privacy when it accessed the web site as part of its investigation. "The explosion of technology that we call the World Wide Web allows individuals to access almost any information available to man. Web addresses and links provide us with the ability to access other sites that did not originally satisfy the terms of our searches and the ability to retrieve more information than we ever thought possible" (at 425). J.S.'s web site was not a "protected" site, with access limited to only those with proper passwords. It, in fact, could be accessed by anybody with the actual web address or proper search terms. According to the court, the creator of a web site controls the site until such time as it is posted on the Internet. Once it is posted, there is no expectation of privacy. The court in J.S. relied on United States v. Charbonneau, 979 F.Supp. 1177 (S.D. Ohio 1997), which held that a creator of email messages does not have an expectation of privacy in electronic mail transmitted over the Internet. The expectation of privacy in email exists only until the intended recipient(s) receives it. Once the creator cannot control the destiny of the electronic transmission, privacy rights in that transmission end.

Killion v. Franklin Regional Sch. Dist. No. 99-731, 2000 U.S. Dist. LEXIS 12687 (W.D. Pa. April 11, 2000). High school student compiled a Top Ten List ridiculing his school's athletic director. Several students distributed the list at school, and other sent and received it by electronic mail. One of the creators of the list was suspended for ten days and served three before filing suit. The student refused to give the names and email addresses of the classmates who help to create and distribute the list, citing freedom of speech and invasion of privacy. The school district argued that the disclosure of the unnamed students was necessary for their disruption defense. The court held for the plaintiff. According to the court, disclosure of the students' names was irrelevant to the disruption defense, as the contributions made by the students occurred off campus and in the privacy of the students' homes. It was the distribution of the list on school grounds that caused the disruption, not the conduct via electronic mail

Geraci v. Conte, No. 72440, 1998 Ohio App. LEXIS 2727 (Ohio Ct. App., June 18, 1998). Walter Conte, in his capacity as principal of Brush High School, often invited students to his home in the summers for swimming parties. He required that the students change clothes is a specific room in his house. Unbeknownst to the students, Conte, installed a one-way mirror in the room for the purpose of spying on the students as they were undressing. He videotaped female students as they were changing clothes. The plaintiffs filed suit against Conte, his wife, and the school district. The trial court granted motions to dismiss all claims. The court of appeals reversed the dismissal with respect to the Contes, and affirmed the dismissal for the district. Ohio law recognizes a claim for invasion of privacy in the form of intrusion into the private activities of a victim "in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities" (at 7). The court noted that a claim for this branch of the tort of invasion of privacy does not depend on any publicity given to the person whose rights were allegedly invaded. Intrusion upon seclusion or private affairs is dependent merely on intentional interference on the part of the defendant. In this case, there is enough evidence against the Contes to proceed with such a claim. The court held that the claim against the district as a whole was rightfully dismissed, as the provision of the swimming parties (including school-sponsored bus transportation) was a governmental function -- an extracurricular activity -- rendering the district immune from suit.

D. False Light Invasion of Privacy

1. Definition and Elements of the Claim

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false in which the other would be placed. Restatement (Second) of Torts § 652E).

Elements to show: (1) publication of facts about plaintiff that place the plaintiff in a false light in the public eye; (2) the "false light" would be objectionable to a reasonable person; and (3) malice or reckless disregard to the truth when the matter is in the public interest.

Note that it is "false light" as to views that the plaintiff does not hold or actions that the plaintiff did not take. There is a First Amendment defense if the matter publicized is a matter of public concern. The defense fails when the defendant acts with malice (knowledge of falsity or reckless disregard with respect to the truth).

2. Codification in State Statutory Law

→ Nebraska. Rev. Stat. Neb. sec. 20-204

> "Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the piblic in a false light is subject to liability for invasion of privacy if: (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

3. Application to Schools

Opinions are protected by the First Amendment and are not actionable under false light invasion of privacy. Schoneweis v. Dando, 435 N.W.2d 666 (Neb. 1989).

False light invasion of privacy is dependent upon publication of the material to the general public, not merely a single person or small group of people. "The mere fact that some interested parties may have heard rumors from sources other than [the defendant] is, without more, insufficient to meet the level of publicity required for a false light claim." Hart v. Seven Resorts, Inc., 947 P.2d 846, 855 (Ariz. Ct. App. 1997). Unsubstantiated allegations are not enough to infer publication by the defendant.

4. Application to Schools in the Digital Age

While there is a First Amendment defense for public interest publication, there may be an extra concern in school settings because the publisher is the school and the alleged victim is a student. Possible ethic of justice issues.

V. Conclusions and Recap of the Ethic of Justice: The Existing Balance

> "The Founders never directly addressed that which they could not contemplate: these pervasive modern-day public and private means of electronic intrusion into a person's home and daily life, particularly with the emergence of electronic records recording the details of an individual's every action. When accessed, such information can be published around the world upon the click of a button. The continuing assault on privacy and individual autonomy was unimaginable two hundred years ago." City of Kirkland v. Sheehan, No. 01-2-09513-7 (King Co. Super. Ct., May 10, 2001).

Disability, Privacy and Protection:
Ruminations on Maintaining Dignity in Public Spaces

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March 23, 2002

List of Handouts

I. Outline of Presentation

II. Hypothetical Scenarios for Discussion

III. Supplementary Materials:

1. U.S. Department of Education IDEA Regulations, Development, *Review and Revision of IEP and Content of IEP*, 34 CFR §§300. 346 & .347

2. U.S. Department of Education Regulations Implementing Section 504 of the Rehabilitation Act of 1973, *Discrimination Prohibited*, 34 CFR §104.4 and U.S. Department of Justice Regulations Implementing the Americans with Disabilities Act, *General Prohibitions Against Discrimination*, 28 CFR §35.130

3. Dear Colleague Letter on Harassment on the Basis of Disability, U.S. Department of Education, July 25, 2000

4. Land v. Baptist Medical Center, 164 F.3d 423 (8th Cir. 1999)

5. U.S. Department of Health and Human Services, *Confidentiality of Alcohol and Drug Abuse Patient Records*, 42 CFR §§2.11, 2.12, 2.14, 2.22, 2.31

6. List of Resources

CODE OF FEDERAL REGULATIONS
DEPARTMENT OF EDUCATION
Current through March 5, 2002; 67 FR 9928
34 C.F.R. § 300.346

(Bold highlights added)
§ 300.346 Development, review, and revision of IEP.

(a) Development of IEP.

(1) General. In developing each child's IEP, the IEP team, shall consider--

(i) The strengths of the child and **the concerns of the parents for enhancing the education of their child**;

(ii) The results of the initial or most recent evaluation of the child; and

(iii) As appropriate, the results of the child's performance on any general State or district-wide assessment programs.

(2) Consideration of special factors. The IEP team also shall--

(i) In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child requires assistive technology devices and services.

(b) Review and Revision of IEP. In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section.

(c) Statement in IEP. If, in considering the special factors described in paragraphs (a)(1) and (2) of this section, the IEP team determines that a child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

(d) **Requirement with respect to regular education teacher. The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of--**

(1) Appropriate positive behavioral interventions and strategies for the child; and

(2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with § 300.347(a)(3).

(e) Construction. Nothing in this section shall be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

Statutory Authority: 20 U.S.C. 1414(d)(3) and (4)(B) and (e)

CODE OF FEDERAL REGULATIONS
DEPARTMENT OF EDUCATION

Current through March 5, 2002; 67 FR 9928
34 C.F.R. § 300.347

(Bold highlights added)
§ 300.347 Content of IEP.

(a) General. **The IEP for each child with a disability must include--**

(1) A statement of the child's present levels of educational performance, including--

(i) How the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children); or

(ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(2) A statement of measurable annual goals, including benchmarks or short-term objectives, related to--

(i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children), or for preschool children, as appropriate, to participate in appropriate activities; and

(ii) Meeting each of the child's other educational needs that result from the child's disability;

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(i) To advance appropriately toward attaining the annual goals;

(ii) **To be involved and progress in the general curriculum** in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and

(iii) **To be educated and participate with other children with disabilities and nondisabled children** in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section;

(5)(i) A statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment; and

(ii) If the IEP team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of an assessment), a statement of--

(A) Why that assessment is not appropriate for the child; and

(B) How the child will be assessed;

(6) The projected date for the beginning of the services and modifications described in paragraph (a)(3) of this section, and the anticipated frequency, location, and duration of those services and modifications; and

(7) A statement of--

(i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and

(ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--

(A) Their child's progress toward the annual goals; and

(B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(b) Transition services. The IEP must include--

(1) For each student with a disability beginning at age 14 (or younger, if determined appropriate by the IEP team), and updated annually, a statement of the transition service needs of the student under the applicable components of the student's IEP that focuses on the student's courses of study (such as participation in advanced-placement courses or a vocational education program); and

(2) For each student beginning at age 16 (or younger, if determined appropriate by the IEP team), a statement of needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages.

(c) Transfer of rights. In a State that transfers rights at the age majority, beginning at least one year before a student reaches the age of majority under State law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority, consistent with § 300.517.

(d) Students with disabilities convicted as adults and incarcerated in adult prisons. Special rules concerning the content of IEPs for students with disabilities convicted as adults and incarcerated in adult prisons are contained in § 300.311(b) and (c).

(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6)(A)(ii))

<General Materials (GM) - References, Annotations, or Tables>

34 C. F. R. § 300.347

34 CFR § 300.347

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
DEPARTMENT OF EDUCATION
PART 104--NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Current through March 5, 2002; 67 FR 9928
34 C.F.R. § 104.4

(Bold Highlights Added)
§ 104.4 Discrimination prohibited.

(a) General. **No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.**

(b) Discriminatory actions prohibited.

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) **Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;**

(iii) **Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;**

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State. . . .

[Portions of Section 104.4 omitted]

CODE OF FEDERAL REGULATIONS
DEPARTMENT OF JUSTICE
PART 35--NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES
35 CFR §35.130
Current through March 5, 2002; 67 FR 9928

(Bold highlights added)
§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability--

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State. . . .

[Portions of Section 35.130 omitted]

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

July 25, 2000

Dear Colleague:

On behalf of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, we are writing to you about a vital issue that affects students in school - harassment based on disability. Our purpose in writing is to develop greater awareness of this issue, to remind interested persons of the legal and educational responsibilities that institutions have to prevent and appropriately respond to disability harassment, and to suggest measures that school officials should take to address this very serious problem. This letter is not an exhaustive legal analysis. Rather, it is intended to provide a useful overview of the existing legal and educational principles related to this important issue.

Why Disability Harassment Is Such an Important Issue

Through a variety of sources, both OCR and OSERS have become aware of concerns about disability harassment in elementary and secondary schools and colleges and universities. In a series of conference calls with OSERS staff, for example, parents, disabled persons, and advocates for students with disabilities raised disability harassment as an issue that was very important to them. OCR's complaint workload has reflected a steady pace of allegations regarding this issue, while the number of court cases involving allegations of disability harassment has risen. OCR and OSERS recently conducted a joint focus group where we heard about the often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.

We take these concerns very seriously. Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement. We are committed to doing all that we can to help prevent and respond to disability harassment and lessen the harm of any harassing conduct that has occurred. We seek your support in a joint effort to address this critical issue and to promote such efforts among educators who deal with students daily.

What Laws Apply to Disability Harassment

Schools, colleges, universities, and other educational institutions have a responsibility to ensure equal educational opportunities for all students, including students with disabilities. This responsibility is based on Section 504 of the Rehabilitation Act of 1973

(Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which are enforced by OCR. Section 504 covers all schools, school districts, and colleges and universities receiving federal funds. Title II covers all state and local entities, including school districts and public institutions of higher education, whether or not they receive federal funds. Disability harassment is a form of discrimination prohibited by Section 504 and Title II. Both Section 504 and Title II provide parents and students with grievance procedures and due process remedies at the local level. Individuals and organizations also may file complaints with OCR.

States and school districts also have a responsibility under Section 504, Title II, and the Individuals with Disabilities Education Act (IDEA), which is enforced by OSERS, to ensure that a free appropriate public education (FAPE) is made available to eligible students with disabilities. Disability harassment may result in a denial of FAPE under these statutes. Parents may initiate administrative due process procedures under IDEA, Section 504, or Title II to address a denial of FAPE, including a denial that results from disability harassment. Individuals and organizations also may file complaints with OCR, alleging a denial of FAPE that results from disability harassment. In addition, an individual or organization may file a complaint alleging a violation of IDEA under separate procedures with the state educational agency. State compliance with IDEA, including compliance with FAPE requirements, is monitored by OSERS' Office of Special Education Programs (OSEP).

Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws. Some of these laws may impose obligations on educational institutions to contact or coordinate with state or local agencies or police with respect to disability harassment in some cases; failure to follow appropriate procedures under these laws could result in action against an educational institution. Many states and educational institutions also have addressed disability harassment in their general anti-harassment policies.

Disability Harassment May Deny a Student an Equal Opportunity to Education under Section 504 or Title II

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program. Examples of harassment that could create a hostile environment follow.

- Several students continually remark out loud to other students during class

that a student with dyslexia is "retarded" or "deaf and dumb" and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.

- A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates' ability to enter the classroom.

- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school through increased absences.

- A school administrator repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required services related to the student's disability.

- A professor repeatedly belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.

- Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

Disability Harassment Also May Deny a Free Appropriate Public Education

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA, as well as Section 504 and Title II. The IDEA was enacted to ensure that recipients of IDEA funds make available to students with disabilities the appropriate special education and related services that enable them to access and benefit from public education. The specific services to be provided a student with a disability are set forth in the student's individualized education program (IEP), which is developed by a team that includes the student's parents, teachers and, where appropriate, the student. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.

How to Prevent and Respond to Disability Harassment

Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions

must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment. A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed.

The following measures are ways to both prevent and eliminate harassment:

- Creating a campus environment that is aware of disability concerns and sensitive to disability harassment; weaving these issues into the curriculum or programs outside the classroom.
- Encouraging parents, students, employees, and community members to discuss disability harassment and to report it when they become aware of it.
- Widely publicizing anti-harassment statements and procedures for handling discrimination complaints, because this information makes students and employees aware of what constitutes harassment, that such conduct is prohibited, that the institution will not tolerate such behavior, and that effective action, including disciplinary action, where appropriate, will be taken.
- Providing appropriate, up-to-date, and timely training for staff and students to recognize and handle potential harassment.
- Counseling both person(s) who have been harmed by harassment and person(s) who have been responsible for the harassment of others.
- Implementing monitoring programs to follow up on resolved issues of disability harassment.
- Regularly assessing and, as appropriate, modifying existing disability harassment policies and procedures for addressing the issue, to ensure effectiveness.

Technical Assistance Is Available

U.S. Secretary of Education Richard Riley has emphasized the importance of ensuring that schools are safe and free of harassment. Students can not learn in an atmosphere of fear, intimidation, or ridicule. For students with disabilities, harassment can inflict severe harm. Teachers and administrators must take emphatic action to ensure that these students are able to learn in an atmosphere free from harassment.

Disability harassment is preventable and can not be tolerated. Schools, colleges, and universities should address the issue of disability harassment not just when but before incidents occur. As noted above, awareness can be an important element in preventing harassment in the first place.

The Department of Education is committed to working with schools, parents, disability advocacy organizations, and other interested parties to ensure that no student is ever subjected to such conduct, and that where such conduct occurs, prompt and effective action is taken. For more information, you may contact OCR or OSEP through 1-800-USA-LEARN or 1-800-437-0833 for TTY services. You also may directly contact one of the OCR enforcement offices listed on the enclosure or OSEP, by calling (202) 205-5507 or (202) 205-5465 for TTY services.

Thank you for your attention to this serious matter.

Norma V. Cantu,
Assistant Secretary for
Civil Rights

Judith E. Heumann,
Assistant Secretary
Office of Special Education
and Rehabilitative Services

Enclosure - list of OCR enforcement offices

United States Court of Appeals,
Eighth Circuit.

Marie LAND, individually and as natural guardian of Megan Land, a minor, Appellant,
v.
BAPTIST MEDICAL CENTER, Appellee.
164 F.3d 423
No. 98-2019EA.

Decided Jan. 6, 1999.

Before RICHARD S. ARNOLD, FAGG, and HALL, Circuit Judges.

(Bold highlights added)
FAGG, Circuit Judge.

After Megan Land broke out in splotches and hives while at Baptist Medical Center's (Baptist) day care, Megan's doctor determined Megan is allergic to peanuts and peanut derivatives. Because of her allergy, Megan must avoid foods containing peanuts and their derivatives and, if exposed, must receive medication to combat any resulting limitation on her ability to breathe. After Megan suffered a second allergic reaction at day care, Baptist refused to provide day care services to Megan. Megan's mother, Marie Land, then filed this lawsuit under the Americans with Disabilities Act (ADA) and the Arkansas Civil Rights Act (ACRA). *See* 42 U.S.C. § 12182(a) and (b)(1)(E) (1994); Ark.Code Ann. § 16-123-107 (Michie Supp.1995). The district court granted summary judgment for Baptist, and Land appeals. Having reviewed the district court's decision de novo and having viewed the record in Land's favor, we conclude the record presents no genuine issue of material fact and Baptist is entitled to summary judgment as a matter of law. *See Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir.1996).

Initially, Land contends the district court committed error in deciding Megan was not disabled under the ADA. The ADA defines "disability" as either "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," "a record of such an impairment," or "being regarded as having such an impairment." *See* 42 U.S.C. § 12102(2)(A-C). Land claims Megan is disabled under any of these definitions, so we address each definition in turn.

First, Land claims Megan's allergy is a physical impairment that substantially limits her major life activities of eating and breathing. For purposes of the ADA, a physical impairment is defined as a physiological disorder affecting body systems such as digestion and respiration, *see* 28 C.F.R. § 36.104(1)(i) (1998) (definition of disability), and we agree that Megan's allergy fits within this definition. We also agree that eating and breathing are major life activities within the contemplation of the ADA. *See id.* § 36.104(2) (definition of disability) (major life activities are fundamental functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"); *Bragdon v. Abbott*, 524 U.S. 624, ----, 118 S.Ct. 2196, 2205, 141 L.Ed.2d 540 (1998) (major life activities include those "central to the life process itself"). **The pivotal question thus becomes whether Megan's allergy substantially limits her ability to eat or breathe, and we conclude that it does not.** A major life activity is substantially limited if an individual is unable to "perform a basic function that the average person in the general population can perform" or is significantly restricted in "the condition, manner, or duration under which [she] can perform a particular major life activity as compared to an average person in the general population." *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1206 (8th Cir.1997); *see* 29 C.F.R. § 1630.2(j)(1) (1998). Whether a major life activity is substantially limited is an individualized and fact-specific inquiry. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir.1998). **In this case, Megan's allergy is not substantially limiting because, as her doctor stated, Megan's allergy impacts her life only "a little bit."** Although Megan cannot eat foods containing peanuts or their derivatives, the record does not suggest that Megan suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted. Additionally, the record shows Megan's ability to breathe is generally unrestricted, except for the limitations she experienced during her two allergic reactions. *See Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir.1997) (although speaking and breathing were hampered during

actual panic attack, disorder did not substantially limit plaintiff's major life activities where attacks were infrequent and very manageable); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir.1996), *cert. denied*, 520 U.S. 1228, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997) (several instances of asbestosis-related shortness of breath did not substantially limit major life activity of breathing). **Thus, although Megan's allergic reaction to peanut-laden foods affects her eating and breathing, her allergy does not substantially or materially limit these major life activities within the definition of disability under the ADA.** *See Snow*, 128 F.3d at 1207.

Next, Land contends Megan is disabled under the ADA because her two allergic reactions at day care created a record of a substantially limiting physical impairment. We disagree. While Megan's allergic reactions "are evidence of a history of an impairment, they are not evidence of a history of a disability." *Robinson*, 101 F.3d at 37 (emphasis omitted); *see Colwell*, 158 F.3d at 645. As we have already stated, Megan's peanut-related allergy does not substantially limit her abilities to eat and breathe.

Finally, Land asserts Megan is disabled under the ADA because Baptist regarded Megan as substantially limited in her ability to attend day care. Again, we disagree. In our view, major life activities do not include those activities like day care attendance that, although important to a particular plaintiff, are not significant within the contemplation of the ADA. *See id.* at 642-43 (gardening, golfing, and shopping are insufficiently fundamental to be major life activities). Even if we assume day care attendance is a major life activity, there is no evidence in the record that Baptist regarded Megan's allergy as substantially limiting her ability to attend day care. Quite to the contrary, Baptist viewed Megan as a normal, healthy, active toddler who was only unable to attend day care at Baptist because the large number of children compared to the number of staff there prevented Baptist from ensuring Megan would not come into contact with foods containing peanuts or peanut derivatives. The fact that Baptist believed its staff was spread too thin to monitor Megan's dietary limitations does not permit the inference that Baptist regarded Megan as incapable of eating a broad range of foods or of attending other day cares better able to monitor Megan's food intake. *See id.* at 647. Because Megan does not fit within the meaning of any of the ADA's definitions of disability, the district court properly granted summary judgment to Baptist on both Megan's ADA claim and Land's claim that Baptist discriminated against Land because of her association with a disabled individual. . . .

We thus affirm the district court's grant of summary judgment on the ACRA claim for the same reasons we affirm summary judgment on the ADA claim

RICHARD S. ARNOLD, Circuit Judge, dissenting.

I respectfully dissent. . . .

On the basis of Dr. Wheeler's testimony, I believe an inference may reasonably be drawn that Megan is substantially limited in her ability to eat. She (or her care-giver) "must read every label of every product that is purchased from a store and ... she must be very careful whenever she is at a party or a restaurant." App. Br. at 8. So long as Megan avoids peanuts and peanut products, she can lead the normal, active life of a toddler. If she ingests a peanut product, however, and has a severe reaction that is not promptly treated, she may go into anaphylactic shock or, worse, die. The risk, therefore, that Megan may accidentally ingest peanuts (a risk that may be slight, if labels are accurate and those responsible for her care are vigilant) must be understood in light of the potential for serious injury.

An interpretive rule issued by the Department of Agriculture supports this position. The rule, *Meal Substitutions for Medical or Other Special Dietary Reasons*, Food and Nutrition Service Instruction 783-2, Rev. 2 (Oct. 14, 1994), was designed to guide schools and other institutions when deciding whether meal substitutions for handicapped persons are required in certain food programs administered by the Department. The rule interprets, for persons with food allergies, the meaning of the word "handicapped," as it is used in the Department's regulations implementing the Rehabilitation Act of 1973. See 7 C.F.R. § 15b.1 *et seq.* (1998). The rule, which was issued by the Director of the Child Nutrition Division, provides that:

> Generally, participants with food allergies or intolerances, or obese participants are not "handicapped persons", as defined in 7 C.F.R. 15b.3(i), and school food authorities, institutions and sponsors are not required to make substitutions for them. ***However, when in the physician's assessment food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or the obesity is severe enough to substantially limit a major life***

activity, the participant then meets the definition of "handicapped person", and the food service personnel must make the substitutions prescribed by the physician.

FNS Instruction 783-2, Rev. 2, at p. 4 (emphasis added). Implementation of the Rehabilitation Act "was not delegated to a single agency," as the Supreme Court noted recently. *Bragdon v. Abbott*, 524 U.S. 624, ----, 118 S.Ct. 2196, 2207, 141 L.Ed.2d 540 (1998). Indeed, "the well- reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 149-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

I believe the Agriculture Department's description of a person as handicapped who has been assessed by a physician as having a food allergy that may result in "severe, life-threatening reactions," coupled with Dr. Wheeler's testimony, raises a question of fact that is properly decided by a jury. The historical facts presented by the plaintiff in this case are "subject to more than one interpretation," and, accordingly, "[t]he trier of fact at trial should decide which interpretation is more persuasive." *St. Louis County Bank v. United States*, 674 F.2d 1207, 1211 (8th Cir.1982).

Federal Regulations Governing Confidentiality of Alcohol and Drug Abuse Patient Records in Federally Assisted Programs

42 CFR §2.11 Definitions.

For purposes of these regulations:

. . . Diagnosis means any reference to an individual's alcohol or drug abuse or to a condition which is identified as having been caused by that abuse which is made for the purpose of treatment or referral for treatment. . . .

Disclosure or disclosure means a communication of patient identifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified. . . .

Patient means any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse at a federally assisted program . . .

Program means:

(a) Any individual or entity (other than a general medical care facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment . . .

Records means any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program.

Treatment means the management and care of a patient suffering from alcohol or drug abuse, a condition which is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient.

42 CFR §2.12 Applicability.

(a) General - - (1) Restrictions on disclosure. The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which:

(i) Would identify a patient as an alcohol or drug abuser . . .
(ii) Is drug [or alcohol abuse information,] is maintained by a federally assisted alcohol or durg abuse program . . . for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment. . . .

42 CFR §2.14 Minor Patients

(a) Definition of minor. As used in these regulations the term "minor" means a person who has not attained the age of majority specified in the applicable State law, or if no age of majority is specified in the applicable State law, the age of eighteen years.

(b) State law not requiring parental consent to treatment. If a minor patient acting alone has the legal capacity under the applicable State law to apply for and obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under subpart C of these regulations may be given only by the minor patient. . . .

(c) State law requiring parental consent to treatment. (1) Where State law requires consent of a parent, guardian, or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under subpart C of these regulations must be given by both the minor and his or her parent, guardian, or other person authorized under State law to act in the minor's behalf.

(2) Where State law requires parental consent to treatment the fact of a minor's application for treatment may be communicated to the minor's parent, guardians, or other person authorized under State law to act in the minor's behalf only if:

(i) The minor has given written consent to the disclosure . . . or

(ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the program director . . .

42 CFR §2.31 Form of Written Consent

[regulations set forth numerous requirements for consent, including who disclosure will be to, purpose of the disclosure, what kind of information is to be disclosed; subject to revocation at any time, requires expiration date]

SOURCES OF INFORMATION

Sources of Disability Information

Working with Students with Disabilities:

George Taylor, *Parental Involvement: A Practical Guide for Collaboration and Teamwork for Students with Disabilities* (Charles C. Thomas Publisher, LTD., 2000)

Judith Buzzell & Robert Piazza, *Case Studies for Teaching Special Needs and At-Risk Students* (Delmar Publishers Inc., 1994)

Promoting Positive Peer Relationships

Janet Farmer & Lizette Peterson, *Pediatric Traumatic Brain Injury: Promoting Successful School Reentry* 24 School Psychology Review 2 (1995)

Janette Klinger, Sharon Vaughan, Jeanne Schumm, Patricia Cohen & James Forgan, *Inclusion or Pull-Out: What Do Student's Prefer?* 31 Journal of Learning Disabilities 2 (1998)

George Dupaul, Kara McGoey & Jeanne Yugar, *Mainstreaming Students With Behavior Disorders: The Use of Classroom Peers as Facilitators of Generalization* 26 School Psychology Review 4 (1997)

Harassment on the Basis of Disability

Baird v Rose et al, 192 F.3d 462 (4th Circuit, 1999)(Alleging discrimination under Title II of the ADA seeking damages for intentional infliction of emotional distress)

Charlie F. v. Board of Education of Skokie School District 68, 98 F.3d 989 (7th Circuit, 1996)

Saxe v. State College Area School District, 240 F.3d (3rd Circuit, 2001)(Finding school districts anti-harrassment policy was unconstitutionally overbroad)

Bruised Inside: What Our Children Say about Youth Violence, What Causes It, and What We Need To Do About It (A Report of the National Association of Attorneys General, April 2000)

Office for Civil Rights, Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448 (March 10, 1994)(available at www.ed.gov/offices/ocr/publications.html)

Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034 (March 13, 1997)(available at www.ed.gov/offices/ocr/publications.html)

Sources of Food Allergy Information[1]

Organizations

American Academy of Allergy, Asthma & Immunology
611 East Wells Street, Milwaukee, WI 53203
(p) 414.272.6071; (f) 414.272.6070
www.aaaai.org

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[1] I am grateful to Benjamin J. Ginsberg, Temple Law '02, for assembling this helpful information.

National School Boards Association
1660 Duke Street, Alexandria, VA 22314
(p) 703.838.6722; (f) 703.683.7590
www.nsba.org
(School Board Guide to Food Allergy Management, updating the School Board policies, Vol. 28, No. 3, National Sch Boards Ass'n (1997)

Allergy Department, The Children's Hospital of Philadelphia
34th & Civic Center Boulevard, Philadelphia, PA 19104
(p) 215.590.2549; (f) 215.590.4529
www.chop.edu

The Food Allergy & Anaphylaxis Network
10400 Easton Place, Suite 107
Alexandria, VA 22030-2208
(p) 800.929.4040; (f) 703.691.2713
www.foodallergy.org
(School Guidelines for Dealing with Students with Food Allergies)

Books and Articles

Legal Issues in School Health Services (Nadine C. Schwab& Mary H. B. Gelfman, eds., 2001)
Marie Plicka, *Mr. Peanut Goes To Court: Accommodating an Individual's Peanut Allergy in Schools and Day Care Centers Under The Americans With Disabilities Act*, 14 J. L. & Health 87 (2000)

Sources of Substance Abuse Information

Marlene Miziket Gonet, *Counseling The Adolescent Substance Abuser* (Sage Publications, 1994)
Evelyn Ogden & Vito Germinario, *The At-Risk Student* (Technomic Pub., 1988)
Confidentiality of Alcohol and Drug Abuse Patient Information,
www.treatment.org (Resource for providing information about substance abuse and alcohol abuse agencies)

Health Records

Health Privacy Project: The State of Health Privacy, www.healthprivacy.org
Mary Gelfman & Nadine Schwab, *School Health Services and Educational Records: Conflicts In The Law* 64 Ed. Law Rep. 319 (1991)

Physical Privacy In School

San Diego (CA) Unified School District, OCR Letter of Findings, Individuals with Disabilities Education Law Report, 36 IDELR 13 (2001)
(Accessibility of handicapped facilities)

Disability, Privacy and Protection:
Ruminations on Maintaining Dignity in Public Spaces

Theresa Glennon
Associate Professor of Law
James E. Beasley School of Law at Temple University

Outline of Presentation

I. The Effects of Public Humiliation on Students with Disabilities

A. Anxiety Caused by Embarrassment Before Peers Hinders Learning and Academic Performance

B. Importance of Promoting Social Relationships of Students with Disabilities

C. Patricia Polacco, Thank you, Mr. Falker

II. Hypothetical One: Reading Aloud as IEP Issue For Student with a Reading Disability

A. Are Parents' Concerns about Child's Involvement in the General Curriculum an Appropriate Topic for an IEP Meeting?

1. 34 CFR §300.346: The IEP team shall consider "the concerns of the parents for enhancing the education of their child."

2. 34 CFR §300.346(d): The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of-- (1) Appropriate positive behavioral interventions and strategies for the child; and (2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child, consistent with § 300.347(a)(3).

3. 34 CFR §300.347(a)(1)(i): IEP must include "how the child's disability affects the child's involvement and progress in the general curriculum."

4. 34 CFR §300.347(a)(2)(i): IEP must include goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum"

5. 34 CFR §300.347(a)(3): IEP must include "a statement of the . . . program modifications or supports for school personnel that will be provided for the child . . . (ii) to be involved and progress in the general curriculum . . .

and (iii) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section."

B. How Should the IEP Team Approach the Parents' Concerns?

1. Benefits and Detriments of Maintaining Privacy

2. Benefits of Participation/Non-Participation in Reading Aloud

3. What Approach Will Best Meet Child's Learning Needs?

4. What will be Reaction of Classmates? What should they be Told?

   A. Note: Disclosure Requires Parental Permission

5. No One Correct Answer

6. Dilemma of Difference

7. Changing the School Environment, e.g., "Celebrating Differences Through Friendship." Goals include:
   a. Acquire knowledge of specific disabilities
   b. Understand the Differences Between Empathy and Sympathy
   c. Use People First Language
   d. Recognize Stereotypes and Individual Attitudes
   e. Foster Friendships by Creating Classroom Communities that Promote Belonging and Acceptance for All
   f. Provide Opportunities and Tools to Develop Broader Friendships
   g. Appreciate, Respect and Support Individual Differences and Needs
   h. Recognize Injustices and be Proactive in Advocating for Change

III. Hypothetical Two: Preventing or Stopping Peer Harassment of Students with Obvious Disabilities

A. What are the Legal Protections against Harassment on the Basis of Disability by Peers?

1. Rehabilitation Act of 1973, 29 U.S.C. §794, Federal Regulations, 34 CFR §104.4(a): "No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance."

2. 34 CFR §104.4(b)(1)(ii): A recipient shall not . . . "afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others"

3. 34 CFR §104.4(b)(1)(iii): A recipient shall not . . . "provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others"

4. See similar provisions in federal regulations under the Americans with Disabilities Act at 28 CFR §35.130

5. OCR Letter of Finding, Flagler County (FL) Sch. Dist., 34 IDELR ¶182 (September 11, 2000)(finding violation of Section 504 and ADA for harassment of student with multiple disabilities).

6. Dear Colleague Letter from Norma Cantu & Judy Heumann, U.S. Department of Education, July 25, 2000
   a. Disability Harassment may Deny a Student an Equal Opportunity to Education under Section 504 and the ADA
   b. Conduct Violates a Student's Rights When it is "sufficiently severe, persistent, or pervasive that it creates a hostile environment"
   c. "Harassing conduct can take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful or humiliating."
   d. "When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively." A school violates a student's rights when it tolerates or fails to correct a hostile environment of which it knows or should have known.
   e. "Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately."
   f. Harassing Conduct can violate the Right to A Free Appropriate Public Education under the IDEA when it decreases "the student's ability to benefit from his or her education and amount to a denial of FAPE."
   g. Letter sets forth measure to both prevent and eliminate harassment.

6. A school's deliberate indifference to disability harassment may render it liable for damages, *see* Davis v. Monroe Country Board of Education, 526 U.S. 629 (1999). Violation of FAPE due to harassment may result in award of compensatory services. *See, e.g.*, Charlie F. v. Bd. Of Educ. Of Skokie Sch. Dist., 98 F.3d 989 (7th Cir. 1996)(compensatory education may be available to remedy harassment; plaintiffs required to exhaust IDEA remedies prior to proceeding on Section 504 and ADA claims).

7. Students unlikely to be able to successfully allege Due Process violations for harassment, even physical harassment. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); D. R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992)(no special relationship between school officials and student, thus school officials not liable under Due Process for sexual assaults against student; Nordo v. School District of Philadelphia, 172 F.Supp.2d 600 (E.D. Pa. 2001)(School defendants not liable for injuries suffered by mentally disabled student and her brother as a result of harassment by fellow students under "state-created danger" theory).

8. Speech Codes: Panacea or Problem? Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001)(school district speech code violated First Amendment; even "harassing speech" is protected by the First Amendment. While school has a compelling interest in preventing discrimination, policy was overbroad because it covered numerous personal characteristics, including values, and extends beyond speech that objectively denies a student equal access to a school's education resources by prohibiting speech that merely has the purpose, but not the effect, of substantially interfering with a student's opportunity to benefit from the educational program and prohibits speech that merely offends another person. School did not demonstrate that its policy was "necessary to prevent substantial disruption or interference with the work of the school or the rights of other students."). *But see* Case Comment, 115 Harvard. L. Rev. 907 (2002)(criticizing Saxe decision).

IV. Hypothetical Three: Need for Education of All Staff and Faculty About Disabilities and the Rights of Students with Disabilities

A. Parent told School District about Student's Suicide Attempt and Depression - Show Choir Teacher excluded her from performance; informed her of this before her peers

B. Did teacher violate student's rights?

1. Michelle is a handicapped person protected by Section 504 and ADA due to her severe depression. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); *see*

also Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1174-75 (9th Cir. 1998)

2. Note: teacher may have violated FERPA by jeopardizing her privacy by singling her out for exclusion from the performance

3. Teacher excluded her from the performance due to her disability - violates ADA if it was a "motivating cause" of the exclusion. Baird at 468. Also, may have duty to modify requirements, 35 CFR Section 35.130(7): A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. See also, 35 CFR §35.130(8): A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

4. Legitimate concerns of teachers: balancing reasonable accommodation and unfairness to other students; doing so without jeopardizing student privacy

C. School Personnel Need to be Educated to Respond Appropriately to Such Information

V. Hypothetical Four: Privacy and Disclosure in the Context of Peanut Allergies

A. Does the School Have an Obligation to Protect A Child with Severe Allergies?

1. What are food allergies? Individual's immune system reacts to food and creates allergic reaction - can be severe, leading to death, or mild - often, doctor cannot predict the severity in advance

2. Is student protected by Section 504 and ADA? Requires that individual have a physical or mental impairment that substantially limits one or more major life activities; have a record of such impairment, or is regarded as having such impairment. See, e.g., 28 CFR §35.104(3); may not be, *see* Land v. Baptist Medical Center, 164 F.3d 423 (8th Cir. 1999)(finding that while peanut allergy is a physical impairment, and that eating and breathing are major life activities, that allergy had only minimal impact on her life because only limited her ability to eat food with peanuts).

3. But Department of Agriculture, Meal Substitutions for Medical or Other Special Dietary Reasons, Food and Nutrition Service Instruction 783-2,

Rev. 2 (Oct. 14, 1994) interprets, for persons with food allergies, the meaning of the word "handicapped," as it is used in the Department's regulations implementing the Rehabilitation Act of 1973. See 7 C.F.R. § 15b.1 *et seq.* (1998). The rule provides that:

> Generally, participants with food allergies or intolerances, or obese participants are not "handicapped persons", as defined in 7 C.F.R. 15b.3(i), and school food authorities, institutions and sponsors are not required to make substitutions for them. *However, when in the physician's assessment food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or the obesity is severe enough to substantially limit a major life activity, the participant then meets the definition of "handicapped person", and the food service personnel must make the substitutions prescribed by the physician.*

4. Is protected, requires "reasonable accommodation; procedural safeguards under Section 504 - best protected by following regulations; developing Section 504 plan

5. Other sources of protection: School's Parens Patriae duty; in some states, potential tort liability; ethical obligation to protect safety of child

6. For some children, protection under IDEA

B. How should school balance privacy concerns, fairness to other children?

1. Total bans: unnecessary and impracticable

2. Knowledge of school personnel: parents' request to maintain secrecy places child at risk - all school personnel need to know what symptoms of a reaction are, how to respond to emergency

3. School should avoid preparing foods with peanuts; teachers conducting lessons including food should avoid foods students are allergic to; if exposure is unavoidable, student should be excused from assignment or exercise

4. Universal policy prohibiting the sharing of food

5. The peanut-free table: controversial. Debate over whether this is necessary; cannot be done if parent refuses to permit disclosure

C. Obtaining Information from Doctor. Requires release of information from parents

VI. Hypothetical Five: Privacy and Substance Abuse Counseling in School

A. Issues of privacy deepen as schools expand their services - school-based health clinics, counseling about sexuality, substance abuse counseling - and also in their coordination with other agencies - child welfare, mental health or disability-services agencies, children's medical providers, etc.

B. Schools face different, often conflicting regimes of privacy. Legal requirements may be found in federal or state law; in many states legislatures have taken certain types of privacy for granted based on ethical obligations of certain professionals; states have not passed comprehensive legislation regarding confidentiality and privacy of health-related records; laws often specific to a single condition

C. Federal regulations place strong restrictions on disclosure of information concerning patient

1. Defines diagnosis, disclosure, patient, program, record and treatment very broadly. Note especially that "record" includes any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program

2. Special issues regarding minors: depends on state law. If state law permits treatment without parental permission, no disclosure needed to treat. (E.g., Maryland, Florida). If state law requires parental permission to treat, must have consent of minor in order to contact parents

3. Consent to Disclosure - strict requirements, including who disclosure will be to, purpose of the disclosure, what information will be disclosed; expiration date needed

D. These requirements, along with many state law requirements, prevent substance abuse counselor from sharing information with teachers, other school personnel without permission - appears to require the permission of the student himself

E. Substance abuse counseling records must be kept separately from educational records

F. Schools need to consider privacy issues in determining the location of substance abuse counseling

HYPOTHETICALS FOR DISCUSSION

Disability, Privacy and Protection

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1. Student with Reading Disability

Sally Jones is about to enter the third-grade student at her local elementary school. She was identified as having a specific learning disability affecting her reading in first grade. Sally still cannot read anything other than the simplest sentences. Her assigned teacher, Mrs. Dixon, believes in having students read out loud throughout the curriculum - sometimes in small group settings, sometimes before the entire class. She has never done it one-on-one with a student. While a few other students stumble over some words, Sally will be the only student in the class who simply can't read the assigned material. Sally's parent have learned about this part of the program from other parents and have requested an IEP meeting prior to the start of school. They do not want the other students to know that Sally is so far behind in reading, as they fear she will be subjected to teasing by her peers if they find out.

How, if at all, should this issue be dealt with on the IEP?

2. Protecting Students with Obvious Disabilities from Harassment

Maria is fourteen and has Tourette Syndrome, which results in her occasionally yelling, having tics, and spitting and drooling on herself. She attends a special education class in her local school district and is included in general education for art, music and lunch. She is constantly called names by the other students in both general and special education. Maria finds this teasing extremely upsetting, and she often comes home and cries about it. Her parents have complained about this to Maria's teacher and the school principal and the students have been lectured about it, to no avail. Much of the harassment takes place on the school bus, which does not have a monitor, and the bus driver has said that he can't control the students and drive at the same time. The last straw for Maria's parents came when another student was permitted to file a grievance about Maria's yelling, tics, spitting and drooling. Maria was required to appear in peer court and listen to the complaints about her. Maria was asked to apologize for her behavior.

Maria's parents have threatened to file an OCR complaint. How should the school respond?

Some school officials believe that the school should adopt a speech code to help protect students like Maria. What interests do the school officials need to consider in drafting such a code?

3. Educating All Staff and Faculty About Disabilities

Michelle was an eighth grader who auditioned for and was accepted for show choir, a course in which students studied and performed show songs. Michelle missed a number of classes due to recurring sinus infections, for which she had notes from her doctor. After auditions, she was given only a small role in the spring play. The show choir director, Miss B, told her that she did not get a bigger role because of her excessive number of absences. The next day, Michelle attempted suicide by taking an overdose of medicine. The next week, she was diagnosed with severe depression and began therapy and medication. Michelle's mother gave the school counselor permission to tell Michelle's teachers about her diagnosis. The next day, when Michelle returned to school, Miss B informed the entire class that Michelle would not be permitted to participate at all in the next show performance, even in her small part. Michelle was devastated. The other students immediately began whispering around the school that Michelle must have done something terrible to be kicked out of the show, especially since other students had missed a lot of classes too and had not been dropped from the show. When Michelle's mother confronted her, Miss B. stated that individuals who suffer from depression could not be counted on to meet their responsibilities.

Did this situation violate Michelle's rights? How should the school have handled this situation? How could it have been prevented?

4. Privacy and Exposure in the Context of Food Allergies

Max, a fifth grade student, has been diagnosed as having a severe peanut allergy. Max's parents contacted the school principal and, stating that they feared for Max's safety, requested that the school ban all peanut products from the school. They did not, however, want the school principal to inform anyone, even school faculty and administrators, who was the child who had the peanut allergy, as they didn't want Max to be seen as the person who caused peanut butter to disappear from the school lunchroom and peanut M&M's to disappear from the vending machine.

Should the school grant Max's parents' request? What obligations does the school have to Max? How can the school balance his privacy and still protect him?

5. Privacy and Substance Abuse Counseling in School

Jason's parents had identified symptoms of substance abuse and had obtained outpatient treatment. They contacted the Student Assistance Provider at his school to request that Jason receive ongoing substance abuse counseling at his school. This provider had training and experience in providing such counseling, and was already providing it to other students. Jason's parents requested that Jason's teacher not be informed of his problem or that he was in treatment. In addition, Jason's parents wanted his attendance at the sessions to remain confidential so Jason would not be stigmatized by the other students. The provider is widely known as the "drug lady" by the students. Her office was centrally located along the main corridor of the school, and as with all rooms in the building, the doors had windows on them. How should the school deal with Jason's parents' concerns?

FERPA, IDEA and Student Discipline: Navigating the "Shark-Infested Waters"

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Paper Presentation
Education Law Association Winter Seminar
Lake Tahoe, Nevada
March 21-24, 2002

Abstract

In the wake of Columbine and similar tragedies, school administrators are placed in precarious positions as they attempt to balance the safety of their constituents with statutory and court-imposed requirements related to student privacy. Legislation relating to student privacy can be traced to 1974 when the Family Rights and Privacy Act (FERPA) was implemented to define the scope of student records confidentiality. The reenactment of IDEA in 1997 provided additional requirements related to the sharing of records of students identified as protected under the IDEA who have been subject to disciplinary action. These requirements do not necessarily correspond with those in FERPA, although components of FERPA have been written into the 1997 reenactment. This paper examines FERPA and the privacy requirements of IDEA with respect to disciplinary procedures. Administrators need to know the "wise practices" in the wake of the various laws and court decisions related to student privacy and school safety.

Introduction

In the era of growing access to records and private information through the Internet, computers, and discarded records, the United States Congress enacted legislation in the form of the Buckley Amendment. In 1974, the Buckley Amendment became known as the *Family Education Rights and Privacy Act, 20 U.S.C. 1232g* (FERPA). FERPA has set forth many guidelines for school districts and administrators. "FERPA regulates student record-keeping activities by giving parents and students access to student records, the right to challenge material contained therein, and the right to restrict publication of personally identifiable information" (Kemerer & Walsh, 2000, p. 293). The FERPA guidelines apply to many areas of education, such as the juvenile justice system, parents' rights, classroom etiquette, publishing student work, and school records. Since the 1974 enactment, several cases related to student privacy rights have been filed on the back of FERPA. FERPA contains several provisions about the privacy of student records and is reasonably clear regarding the precautions and procedures that school administrators should take prior to releasing student records.

Additional constraints related to student privacy were placed on districts and administrators in 1997 when the *Elementary and Secondary Education Act* was re-enacted and the *Individuals with Disabilities Act* (IDEA) was reborn. IDEA limited the ability of administrators to share information, specifically regarding students with special needs. Although the IDEA incorporated FERPA language, specific details in IDEA provide for additional privacy protections related to age of consent procedures for students who receive special education and related services. Yet, a potentially troublesome provision in IDEA is worthy of careful administrative attention. IDEA requires the disclosure of a student's special education records to law enforcement officials in disciplinary cases involving criminal activity. At the same time, IDEA regulations require school officials to comply with FERPA when disclosing any records. A situation, therefore, exists whereby a school administrator may be forced to choose between two conflicting federal laws. As the era of increased litigation in public schools matures, school administrators are placed in a precarious position. Clearly, IDEA legislation has provided parents and students with a solid foundation from which to base

litigation, causing school administrators to have an increased consciousness of IDEA requirements. Still, FERPA legislation allows for federal enforcement action against violators. Moreover, liability to schools for damages to students under FERPA violations have been imposed through the courts.

This paper will introduce a brief discussion of privacy components of FERPA and IDEA legislation through a case study. Key issues such as school safety and disputed records, with reference to both IDEA and FERPA will follow, leading to a summary of best practices for school administrators and conclusions.

Case Study Scenario

A high school principal is notified that two students are in possession of handguns. Following appropriate procedures, the principal confiscates the weapons and contacts the parents and representatives from law enforcement. When the school liaison from the police department arrives, the principal has a short meeting. During the course of the meeting, the principal indicates that one of the students receives special education services through the school and will require additional hearings at the school regarding educational placement. This information, the principal says, will be very important to the county juvenile probation officer.

When both sets of parents arrive, the principal allows for a short meeting between the police and the parents in the conference room at the school. In a spirit of cooperation, the police meet with both parents at the same time and inform them of the legal procedures to take place when the students leave the school. During this meeting, the police allude to the principal's comments about one of the students having additional protections, necessitating further meetings at the school. As the meeting ends, the parents of one of the students demand that their student be released, as their student has been identified as protected under IDEA with a handicapping condition for an emotional disability, and cannot be disciplined in this manner without convening of a case conference. The police overrule the parents and arrest and escort the students from the school. Within the day, the school principal is made aware that one of the parents has contacted legal counsel regarding a violation of student rights to privacy under FERPA.

Law and Key Components

FERPA

The Family Education Rights and Privacy Act (FERPA) "protects the privacy interests of students and parents through standards designed to discourage abusive and unwarranted disclosure of a student's educational records" ("Information Sharing," 1996, p.1). Examples of abusive practices include, but are not limited to, sharing student information regarding abuse, emotional instability, HIV status, immigrant family status, and/or poverty. Although this information may be important to the professionals working with students, it is not public information. The FERPA addresses several privacy issues. Among these issues are parental consent for disclosure of information, parental access to and review of educational records, and the definition of educational records as it applies to classroom practices. Each of these issues is discussed below.

Parental Consent for Disclosure

The FERPA prohibits the disclosure of personally identifiable student information without consent from a parent or guardian. This consent must be written and needs to identify the records being requested. An essential piece of this consent is that the school district is required to keep a log to document requests by individuals who require prior parental consent to access student records. The log, according to the School Law Bulletin ("FERPA doesn't mandate," Jan, 2002), must be kept as long as the student records are "viable." No consent is needed if the records are being furnished to school officials, including teachers, when the school officials have a legitimate educational interest, and therefore, no log needs to be kept to document inquiries from these individuals. Additionally, consent is not necessary in cases of court orders or subpoenas. Furthermore, according to the School Law Bulletin ("FERPA doesn't mandate," Jan, 2002), school districts do not need to log access or requests made by those who do not require parental consent to view student records. If a court order or subpoena is issued, the school district must make a reasonable effort to let parents know in advance.

While a school district may choose to issue blanket consent for image and other directory information to be posted to a web page or other areas of published material, the best practice is to have consent for each time a student's work is to be published with personal information. According to Baskin and Surrat (2001), a blanket parental consent form may not comply with the FERPA.

Parental Access and Review of Records

A parent may request a copy of a student's educational record without giving a reason to the district. In Texas, if a parent makes such a request, a school district may withhold the records and ask for an opinion from the Texas Attorney General within 10 business days of the written request.

In addition to being guaranteed access to student records, parents may review the records for accuracy. If a parent finds something that can be considered misleading or inaccurate, the parent may request a change or correction to the record. School officials must respond promptly to these requests. The definition of "promptly," however, is subject to interpretation. When responding to these requests, the school officials must decide if the requests hold merit and require altering the record or if the request will be denied. If the request is denied, the parent must be granted the opportunity for a hearing. Important to note, however, is that the FERPA guidelines do not apply to grades or educational decisions made about students by school personnel.

The Definition of Educational Records

Congress initially places a very generalized definition of educational records into FERPA legislation. Within six weeks of its enactment, Congress altered the general definition to include:

> those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution." This broad conceptual definition is still intact. This definition of records applies to FERPA's access, disclosure and

> challenges to records provisions. Under it, records received by schools from outside sources are FERPA records if the school maintains them. The definition makes clear that FERPA records are not limited to documents in the official "student file" - the material may be in a teacher's desk, nurse's office, or principal's file, among other places. Regulations note that student information may be recorded in a variety of ways, "including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." (Daggett & Hueffner, 2001)

With such a broad definition, school administrators are placed in a precarious position. According to Hanahan (2000), the Attorney General of the State of Texas is currently taking the position that the educational institution is responsible for determining whether documents constitute "educational records" as defined by the FERPA and whether parental consent has been obtained to warrant the release of such records. This puts more emphasis on school district leaders to develop policies that fit the FERPA guidelines. Also, as part of this statement, the Texas Attorney General is sending interpretation requests to the U.S. Department of Education for review.

In the absence of a specific definition of "educational records," school administrators have been subject to various court decisions. These decisions have provided school leaders with assorted definitions of educational records, including, but not limited to, tests, report cards, class work, written statements, and photos. According to The Office of Special Education and Rehabilitation Services (website), certain records are exempt from FERPA guidelines. These records are referred to as "sole possession records," and are defined as the general information, usually handwritten, that school officials or teachers use as a reference for personal memory about a student.

The definition of educational records has received recent notoriety. A recent Supreme Court ruling provided additional guidelines to teachers in determining the definition of educational records. Walsh (2001) refers to the *Owasso Independent School District v. Falvo* case as one that defines educational records in the classroom. The parent in the case alleged that the practice of grading student papers in the classroom was a violation of FERPA and proved to be embarrassing for her children. Prior to the Supreme Court's decision to hear the case, President George W. Bush had asked that the Department of Education to set guidelines and has asked the Supreme Court to turn down hearing the case. "Under Supreme Court rulings, formal regulations would likely be accorded more deference by the federal courts"(Walsh, 2001, p.2). The Supreme Court's decision, in short, stated that until a grade is entered into a teacher's grade book, class work does not qualify as an educational record. "In rendering their decision, the nine justices unanimously agreed that peer grading does not violate a student's rights to privacy" (Starr, 2002, p. 2).

Furthermore, the court cited the benefits of peer grading as a method of re-teaching students and promoting higher levels of understanding. The Court's point was "[Correcting a classmate's work] helps show students how to assist and respect fellow pupils" (Starr, 2002, p. 3). Although this changes and clarifies FERPA for school districts, most districts are still taking a stricter view than the courts now allow.

Specific Exceptions provided in FERPA

With regard to student discipline, FERPA provides school administrators with four specific situations in which a release of student records to law enforcement does not require parental consent. It is essential that school administrators both identify and utilize these exceptions in situations. The first exception applies only when the disclosure of educational records relates to the juvenile justice system and its ability to serve the student whose records are released. A caveat to this exception is that state statute must be in effect, allowing for the release of information.

A second allowable exception to FERPA protection relates specifically to situations deemed emergency or "necessary to protect the health or safety of the student or other persons" (Mayes & Zirkel, 2000). While the definition of emergency may be debatable, clearly any on-campus misbehaviors that also constitute criminally prosecutable offenses fall into this exception.

Third, if school districts employ campus police or have officers assigned to school grounds, and if these law enforcement personnel keep records solely for law enforcement purposes, the sharing of these records is permissible, as these records do not constitute educational records.

The final exception to FERPA protections that may be utilized by school personnel when sharing student records in disciplinary situations requires a court order or a subpoena. Still, after receiving the court order or subpoena, the school administrator must make a "reasonable effort" to notify the student or the student's parent (depending on age of consent issues) notice, before complying. Upon receiving that notice, the affected party may seek to challenge the subpoena or court order requiring the sharing of the information. In this case, the court or judge may have to argue the reasoning behind the request to a second court.

IDEA

IDEA regulations regarding student privacy apply specifically to students who have protected status as a result of being identified with a handicap. While the content of student records have the potential of being embarrassing, special education records can be harmful if not kept confidential. IDEA regulations provide that school districts permit parent access to special education records for the purpose of inspection and review. Additionally IDEA provides that school districts maintain a log of all persons accessing special education records. School district personnel typically comply with this regulation by providing a "log sheet" for education personnel and others with appropriate educational reasons to complete when accessing the records of special education students. The "log sheet" must include the reviewer's name, date, and a purpose for reviewing the record. The school district must provide the parent with a copy of the individualized educational plan (IEP) at no cost to the parent. As with other "educational records," parents have a right to review the file for accuracy and request for information to be amended.

While IDEA allows for a special education students records to be shared, it is important to understand that privacy regulations in IDEA are based on FERPA legislation. In the 1997 re-enactment of IDEA, the regulatory language from FERPA was included but was slightly altered in order to fit the special education needs. FERPA

states, "an agency reporting a crime committed by a child with a disability shall ensure that copies of the special education records of the child are transmitted for consideration" (Mayes & Zirkel, 2000, p.3). The IDEA regulation repeats this language and adds the following "an agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permuted by FERPA" (Mayes & Zirkel, 2000, p.3). Specific issues related to sharing protected student information with law enforcement and legal agencies follow in the next section.

School Safety and Privacy Issues

Regulations and statutes, many administrators believe, have bound the hands of educational leaders and of districts in keeping schools safe. When a student violates the law, sharing information between schools and the juvenile justice system is indispensable. Both FERPA and IDEA have regulations in their texts that allow for the sharing of student records with law enforcement officials. Under FERPA, "any of this information may be given to juvenile justice agencies through court order, consent, certain state laws, or law enforcement record exception" (Laney, 1996, p.1). The only exceptions provided for by the law occurs in those cases when the information is in connection with an emergency and knowledge of the information is necessary to protect the health or safety of the student or other individuals (The Office of Special Education and Rehabilitation Services, website). Additionally, according to Spar (2001), FERPA allows a school district to disclose education records pursuant to a judicial order or lawfully issued subpoena upon notice to the parent or student and in advance of the disclosure so that the parent can seek a protective order.

"The general belief among teachers and administrators is that IDEA insulates special education students from experiencing consequences for their disciplinary infractions..." (Taylor & Baker, 2002, p. 28). The ensuing policies and practices, then, tend to be more protective of student records of students with disabilities than the records of their peers.

In the case described in this paper, one could argue that there is no legal status for the school principal to share any information about either of the students involved until receiving a written request from the judicial system or consent from the parents of the students.

> FERPA would permit disclosure of the special education and disciplinary records ... only with the prior written consent of the parent or a student aged 18 or older, or where one of the exceptions to FERPA's consent requirements apply ... For example, disclosure of special education and disciplinary records would be permitted when the disclosure is made in compliance with a lawfully issued subpoena or court order if the school makes a reasonable attempt to notify the parent of the student of the order or subpoena in advance of compliance... Prior notice is not required when the disclosure is in compliance with certain Federal grand jury or other law enforcement subpoenas. In these cases, the waiver of the advance notification requirement applies only when the law enforcement subpoena or court order contains language

> that specifies that the existence or the contents of, or the information furnished in response to, such subpoena or court order should not be disclosed. (The Office of Special Education and Rehabilitation Services, website)

An interesting twist to the situation is that the police official, technically, provided the evidence of any possible violation of student privacy rights. This technicality, in itself, does not constitute a violation as the police are not considered an educational agency, and therefore FERPA regulations do not apply ("Police records disclosure", December 2001).

Disputed Records

A U.S. District Court case in Southern Ohio in 1998, *United States of America v. Miami University,* provided a definition of "educational records." In the case, students brought action against Miami University for releasing disciplinary records with personally identifiable information about the students to a newspaper publisher that claimed entitlement to the records under a state "Freedom of Information" act. The students "urge[d] the Court to make permanent its February 12, 1998, order that discipline records are, indeed, "educational records" within the meaning of the federal law" (United States of America v. Miami University, 1998, p.1). The court found for the students, indicating that disciplinary records are, indeed, educational records.

In *Jensen ex rel. C.J. v. Reeves, 34 IDELR 31(10TH Cir. 2001),* parents brought claim against a school district regarding the release of student information following a ten day suspension of their child for behavior difficulties. The school district sent letters to the parents of the students affected by the misbehavior. The 10th Circuit ruled on part of the district. The court held that the district did not violate FERPA by sending the letters to the children's parents who were victims or witnesses of the student's misbehavior. The letters did not constitute the release of an educational record. "The Court held that to rule otherwise "would place educators in an untenable position: they could not adequately convey to the parents of affected students that adequate steps were being undertaken to assure the safety of the student"("The 10th Circuit Court," April 6, 2001).

Best Practice for Administrators

As a wise practice, a school district should keep notes on all IEP meetings, special education team staff meetings related to the student, and document any disagreements between the parties involved. In addition to the documentation of all IDEA-related matters, the following list and explanations may be considered effective in the promotion of a healthy and legal environment with respect to confidentiality of student records.

1. It is essential that all personnel copiously document following appropriate procedures when dealing with student records and information.
2. School administrators and boards must establish clear policies regarding the treatment of educational records.
3. Personnel accessing student records must do so for reasons specific to legitimate educational interests. According to the *School Law Bulletin* ("District violates," November, 2001), not only must personnel accessing student records have legitimate educational interests, but the reasons for that access must also be for educational purposes.

4. School administrators are wise to establish education activities regarding the treatment of student educational records and documentation of such activities for all employees.
5. School safety issues and the protection of students is the only defensible reason (excepting a court order) to share student information without prior parental consent. According to *The Special Educator* ("Disclosure of a student's," 2002), school district personnel is allowed to disclose personally identifiable information from a student's educational record without parental consent if two situations are present: (1) the disclosure is in connection with an emergence, and (2) knowledge of the information is necessary to protect the safety of either the student or other students. Additionally, according to FERPA, once the jurisdiction of the juvenile court is invoked, any information related to a present or impending dangerous situation may be shared without parental consent.
6. School employees must develop a vigilant attitude toward the protection of student information. No identifiable student information is to be published without prior written parental consent.

Detailed documentation, more than any other single practice, can support a school district and school administrator in cases of alleged FERPA violation. It is important to note that when filing complaints, the nature of the allegation must be highly specific. As reported in the *School Law Bulletin* ("FERPA protects information," October, 2001), a proper complaint must include several specific details including the date of the violation, the information disclosed, the person making the inappropriate disclosure, and the person to whom the information was disclosed.

Conclusion

The confidentiality of students has to be a main concern among school administrators and teachers. The Family Education Rights and Privacy Act along with Individual's with Disabilities Act function as powerful tools to protect student records. The FERPA guidelines extend to many actions taken each day within a school district. Teachers, administrators, and counselors need to know what constitutes an "educational record" and the extent to which these records are protected. FERPA is mandated in an age of information and technology, within this age the need to keep personal information confidential is becoming more difficult. FERPA, like many laws, has been slightly ambiguous and becomes clearer through litigation. Administrators need to keep abreast of the changing laws and best practice in order to implement those practices. Administrators need to train and keep building-level staff current in the knowledge of both changes in the law and of district policies and procedures enacted to maintain legal practice.

In conclusion, the definition of educational record in the Family Educational Rights and Privacy Act permeates many areas of education. IDEA, also, entitles special education students the rights of privacy covered under FERPA. Yet, both forms of legislation come down to the rights of parents and student to keep student information confidential while allowing schools to remain safe and secure. In the ever-changing world, school districts need to stay abreast of new legal actions and laws that impact school practices.

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The Korean Supreme Court Viewpoint of Professor-Assistant Sexual Harassment

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Paper Presented at ELA Winter Seminar 2002

Introduction

As the woman has increasingly participated in the social life and the woman's right has expanded, sexual discrimination has been one of hot issues in Korea. One of the driving forces against sexual discrimination was the professor's sexual harassment to his assistant.

This harassment has resulted in a litigation. In response to this litigation some provisions on the sexual harassment was created or included in the Anti-Sexual Discrimination and Remedy Act and the Anti-Sexual Discrimination in Employment Act. However, this litigation has caused some critiques, such as the restriction and destruction of the loving relations, human relations, and working life between the man and the women. Finally, the Korean Supreme Court issued the first and the memorial ruling on the sexual harassment.

Therefore, I will analyze the Korean Supreme Court case on the professor-assistant sexual harassment. More specifically, I will examine two research questions. First, what constitutes the sexual harassment? Second, who are held to be liable for the sexual harassment and why? This analysis can contribute to refining legal theory on the sexual harassment. For this analysis I will offer the process of the litigation

The Process of the Litigation

The plaintiff was the woman who assisted the operation of the machine in the Department of Chemistry. The plaintiff argued that the professor of this department has harassed her continuously

and tenaciously and laid off her because of her rejection of his sexual favor. She claimed for mental damages from the professor's sexual

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harassment against the professor. She also claimed for damages against the president of the national university where the professor belongs to, as a supervisor of the perpetrator on account of his negligence. Finally, she claimed for damages against the state as an employer of the perpetrator, who breached the duty to prohibit sexually discriminative environment on the contract.

The Seoul Civil District Court ruled in favor of the plaintiff because the perpetrator's action to foster sexual humiliation and displeasure violated the plaintiff's rights to human dignity, pursuing happiness, and work in the environment which ensures her dignity and her sexual freedom and the principle to prohibit sexual discrimination in employment and work in that he has the power to determine her working conditions (93Kahab77840, 1994). Therefore, the court accepted the plaintiff's claim for damages against the professor as a perpetrator. However, the court rejected her claim for damages against the president because he did not involve in the day-to-day operation of the department and the professor's sexual action was due to his personality and was occurred during the process of research. Also, the court rejected her claim for damages against the state on the count of her procedural failure.

However, the Seoul Circuit Court reversed the Seoul Civil District Court's ruling for two reasons (94Na15358, 1995). First, the professor's action belonged to his discretion, the original period for her employment was only one year, the reemployment was not a custom, and her layoff resulted from her insincerity. Second, the professor's action was performed during his work, was not sexually salient, and has, if any, minimal sexual intent. Therefore his action failed to meet the conditions for the environmental sexual harassment.

For this ruling the Seoul Circuit Court has suggested some legal theory for sexual harassment. First, sexual harassment is a tort because it invades the victim's rights to personality and labor. However, the victim's rights can be restricted for the harmonious social life in order to balance the others' rights. Further, there are two kinds of sexual harassment. The quid pro quo sexual harassment is the harassment that causes the victim's advantage or disadvantage in the working conditions on the basis of whether the victim accepts the perpetrator's sexual action. The environmental sexual harassment is the harassment that the perpetrator's action creates sexually

hostile environment and changes the working conditions. Moreover, whether the perpetrator's action is sexual harassment should be judged in terms of the totality of the circumstances. As these circumstances, the court should consider the following factors:

(1) The perpetrator's action should be related to his or her job.

(2) This action should be sexually salient and sexually intended and its aspect should be important and exhaustive.

(3) The victim does not want the perpetrator's action. To judge this fact the court should consider the victim's psychological attitude, the objective situation surrounding the action, and the victim's psychological and social damages from the existing social bias.

(4) There should be discriminative treatment in the working conditions or the working environment on the basis of sex.

In addition, the court should adopt the reasonable person standard because the reasonable woman standard regards the relationship between the male and the female as combative and rival while the reasonable person stand considers such relationship as common and harmonious. Finally, the victim, not the perpetrator should have the burden of proof. The victim should prove that his or her layoff or resignation resulted from the quid pro quo sexual harassment or there is reduction in the ability of working and serious mental damages from the environmental sexual harassment beyond individual anger, sadness, resentment, surprise etc.

The plaintiff appealed because of the Seoul Circuit Court's legal misinterpretation, such as higher standard for sexual harassment. She claimed for damages against the state as a employer of the perpetrator and a defendant and against the president of the national university as a supervisor of the perpetrator.

The Korean Supreme Court reversed the Seoul Circuit Court's ruling on the perpetrator's liability for sexual harassment. However, the court did not accept for the state's and the president of the national university's liability.

The Analysis of the Korean Supreme Court's Ruling

I will analyze the Korean Supreme Court's ruling on professor-assistant sexual harassment in two ways: (1) what constitutes sexual harassment and (2) who are held to be liable for sexual harassment?

What constitutes sexual harassment?

The Korean Supreme Court defined the sexual harassment as tort because it invaded the victim's right to personality in that it injured the victim's dignity and it gives victim the mental damages. From this definition I can draw two assumptions on the sexual harassment. First, the sexual harassment is tort. This assumption is consistent with the definition of tort in the Korean Civil Act. According to this act, to be tort five conditions should be satisfied:

(1) the perpetrator's intent or mistake
(2) the perpetrator's capacity
(3) illegality
(4) actual harm
(5) proximate cause.

Sexual harassment can meet these five conditions:

(1) the perpetrator's intent or mistake: Sexual harassment occurs when the perpetrator exchanges his power for the victim's sexual favor intentionally or when s/he facilitates sexually hostile environment intentionally or mistakenly.
(2) the perpetrator's capacity: In higher education institutions the selection of faculty members and the admissions of students are based on many criteria that guarantee their criminal responsibilities.
(3) illegality: The sexual harassment is illegal because it invades the victim's right to personality. Also, sexual harassment is not true to justifiable causes that the Korean Criminal Act suggests. The sexual harassment is not justifiable act because there is no law to permit the sexual harassment during this litigation and recently the law prohibits the sexual harassment, there is no business urgency for the sexual harassment, and there is no common sense to permit the sexual harassment. The sexual harassment is not self-defense, act out of necessity, and self-remedy since there is no perpetrator's protected interest. There is no victim's permission for the sexual harassment considering the unequal power relations. Finally, in terms of balancing interest the perpetrator's protected interest does not exceed the victim's invaded interest because there is no perpetrator's protected

interest. Even though the perpetrator may argue for his or her privacy right or freedom of expression, these interests can be restricted for the common interest.

(4) actual harm: The sexual harassment does harm to the victim's physical and mental conditions.

(5) proximate cause: There is proximity between the perpetrator's sexual harassment and the victim's actual harm because the sexual harassment means the perpetrator's request for sexual favor in exchange for his or her power or the sexually hostile environment caused by the perpetrator's action.

Second, the legal basis for the sexual harassment is the right to personality in the Korean Constitution. The reason why the Korean Supreme Court found out the legal basis for the sexual harassment in the right to personality seems to be the fact that there were no laws on the sexual harassment during the litigation. However, in response to this litigation the provisions on the sexual harassment were included in both the Anti-Sexual Discrimination and Remedy Act for prohibiting the sexual harassment in the public institution and the Anti-Sexual Discrimination in Employment Act for prohibiting the sexual harassment in the workplace. Therefore, in the future the legal basis for the sexual harassment should be these two acts. Also, the constitutional basis for the sexual harassment should be the equal protection clause and the female labor protection clause because the Anti-Sexual Discrimination and Remedy Act regards the sexual harassment as sexual discrimination.

The Korean Supreme Court did not classify the sexual harassment into the quid pro quo sexual harassment and the environmental sexual harassment because retaliatory layoff or unfair involvement in the working environment is not a condition to determine tort but only a factor to calculate compensation. However, it does not seem to be persuasive for three reasons. First, it is not consistent with the provisions on sexual harassment in the Anti-Sexual Discrimination and Remedy Act and the Anti-Sexual Discrimination in Employment Act. The former defines the sexual harassment as " in the work, employment, and other relations the worker, the employer, or the employee causes sexual humiliation or hatred through the sexual action by his or her status or in relation to the work and gives the victim disadvantages in employment decisions because of the rejection

of the sexual action or advance." The latter defines the sexual harassment as "the owner, the supervisor, or the worker causes sexual humiliation and hatred by his or her status or in relation to the work and gives the victim disadvantages in employment decisions because of the rejection of sexual action or advance." Therefore, these two acts classify sexual harassment into the quid pro quo sexual harassment and the environmental sexual harassment. Further, there are differences in the conditions to determine these two kinds of sexual harassment. For example, only one time action can be meet the condition for the quid pro quo sexual harassment while only one time action cannot do so for the environmental sexual harassment unless it is very serious. Finally, the quid pro quo sexual harassment is usually occurred in the unequal power relations while the environmental sexual harassment does not always so.

The Korean Supreme Court judged the sexual harassment in terms of the totality of the circumstances. This judgment is consistent with the EEOC (Equal Employment Opportunity Commission)'s guideline for the sexual harassment and the United States Supreme Court's viewpoint. Also, the Korean Supreme Court suggested six conditions to consider for determining the sexual harassment:

(1) the perpetrator's and the victim's ages and relations
(2) the place and the context for the perpetrator's action
(3) whether the perpetrator has sexual intent or motive
(4) the victim's explicit or implicit response to the perpetrator's action
(5) the content and the extent of the perpetrator's action
(6) whether the perpetrator's action is once, short-term, or continuous.

I think that these six conditions have two weak points. First, they make the classification between the quid pro quo sexual harassment and the environmental sexual harassment unclear. For example, the former can be occurred by only one-time action while the latter cannot do so unless the action is very serious. Second, the victim's explicit or implicit response to the perpetrator's action seems to be inappropriate because there is a possibility that the victim is difficult to reject the perpetrator's action on account of retaliation and false rumor.

The Korean Supreme Court judged the sexual harassment from the community's viewpoint. The community's viewpoint means that the sexual

harassment should be judged on the basis of whether the perpetrator's action can be permitted in terms of common sense and community's custom. This viewpoint has a weak point. It seemed to overlook the current man-dominated social structure and culture. Therefore, the victim may have difficulty in seeking the remedy because the majority of the victims of the sexual harassment is female and there is a tendency that the man less judges the same action as the sexual harassment than the woman. However, the reasonable woman's viewpoint is also not appropriate since it is not gender-neutral, degrades the woman, and is difficult to apply to sexual harassment between the same gender. Therefore, the alternative seems to be the reasonable person with the same gender as the victim's viewpoint.

Who are held to be liable for the sexual harassment and why?

The Korean Supreme Court ruled that the perpetrator was liable for the sexual harassment because he caused sexually hostile environment. The reason for this ruling was that his action had sexual motive and intent and invaded the victim's right to personality on account of its stubbornness if one considered that he directed and supervised her.

Also, the Korean Supreme Court suggested that to meet the conditions for the sexual harassment the victim should not prove that the perpetrator's action did serious harm to her working conditions or her mental health beyond her anger, sadness, resentment, surprise, etc. I agree with this suggestion because it can contribute to remedying the victim's right. However, I don't think that the victim should have the burden of proof since it is very difficult to prove sexual harassment if one considers that sexual harassment is usually occurred privately and secretly. Therefore, it would be more reasonable for the perpetrator to have the burden of proof like the environmental litigation.

However, the Korean Supreme Court did not accept that the victim's layoff was retaliatory because there were no defects in the Seoul Circuit Court's ruling that she was laid off because she was insincere, the period for her employment was one year on the contract, there was no custom to reemploy the assistant, and the perpetrator had no official power for personnel management. I do not agree with this ruling for three reasons. First, the court left the possibility that the perpetrator could justify his

sexual harassment and his retaliatory action on the basis of the victim's weak points. Further, the court did not consider that the former assistants were not reemployed because of their personnel conditions such as moving to the better job. It seemed that if one considered the expensive training cost and the importance of experience she had expectations for reemployment. Finally, the court overlooked the perpetrator's substantial power for personnel management since he recruited her and the former assistants.

Also, the Korean Supreme Court did not accept the employer's and the supervisor's liability for sexual harassment for three reasons:

(1) They did not know and should not have known the perpetrator's sexual harassment.
(2) They did not conceal and were not willing to conceal the perpetrator's sexual harassment.
(3) The perpetrator's sexual harassment was not related to his job.

I do not agree with this ruling if one considers the conditions for the employer's and the supervisor's liability for tort in the Korean Civil Act (Na 1994: 90-91):

(1) They employed or supervised the perpetrator.
(2) The perpetrator's sexual harassment was his job because the state and the university obtained some benefits from his research.
(3) The perpetrator's action met the conditions for tort.
(4) The perpetrator gave her the loss such as her layoff and sexual humiliation.
(5) The employer and the supervisor knew and should have known the perpetrator's sexual harassment because this harassment was spread out the university through the wall-poster.

Conclusion and Suggestions

I analyzed the Korean Supreme Court case on professor-assistant sexual harassment. The court ruled that the perpetrator was liable for the hostile environment sexual harassment, not the quid pro quo sexual harassment, while rejecting the employer's and the supervisor's liability for the perpetrator's sexual harassment.

However, the court did not consider the victim's viewpoint sufficiently. First, the court judged the sexual harassment from the community's viewpoint which seemed to reflect the male-dominated social structure. Further, the court argued that the burden of proof should lie in the victim, not he perpetrator, even though the victim is very difficult to prove the sexual harassment because it happened secretly and privately.

The Korean Supreme Court defined sexual harassment as tort on the basis of the invasion of the victim's right to personality. In the future the court should the sexual harassment as sexual discrimination on the basis of the Anti-Sexual Discrimination and Remedy Act and the Anti-Discrimination in Employment Act. This can contribute to remedying the victim's right by understanding that the sexual harassment can be occurred in the unequal power relations. Also, the court should classify the sexual harassment into the quid pro quo sexual harassment and the hostile environment sexual harassment for the consistency with the definitions of the sexual harassment from these two acts and for considering the conditions for the quid pro quo sexual harassment sufficiently.

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Discriminatory Surveillance: Issues of Equity, Privacy and Security in Schools

Educational Law Association
Privacy Rights in the 21st Century: Winter Seminar 2002

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Abstract

Both the Congress and Supreme Court have recently addressed student privacy issues. What future round of legal challenges can school officials expect from matters of equity, student privacy and school security technology? Following recent events, school officials may find it easy to convince themselves, school boards and parents that security technology belongs in schools to counter terrorism and enhance safety. But without rigorous inquiry into the behavioral, educational and developmental impacts of security technology on campuses, education officials could implement safety, security and surveillance tactics so intrusive they could arrest the development of those it is designed to protect. A discussion follows on how these security issues may collide with equity and privacy in an educational environment.

In the end, we simply cannot protect freedom by forsaking freedom. As much as we want to be safe from terrorism, we cannot make ourselves more secure by making our values less secure.

---Janis Besler Heaphy, president and publisher of the *Sacramento Bee*, commencement speaker booed off the stage for advocating the protection of civil liberties, December 2001

Commenting on Janis Besler Heaphy's graduation speech cut short by hecklers from the graduating class of Sacramento State University, Robert Jones, a university vice president said, "It was when she started defending *habeas corpus* that things went downhill."[1] Perhaps we should expect such a reaction from Sacramento's graduating students where the largest percentage of bachelor's degrees awarded are in marketing, business and protective services.[2] After all, their future corporate employers will likely profit from selling security technology or marketing databases like those maintained by the American Student List, declaring on its web page, "To help you reach this highly lucrative market, ASL has compiled over 12 million names of children between the ages of 2 and 13."[3]

Graduating students may view civil liberties of the type Janis Besler Heaphy describes as barriers to their future bottom line but it was those same liberties that protected them through the developmental stages of their childhood to the point of their current academic achievement. These students' stunning intolerance of their inherited democratic principles follows a disturbing trend of attitudes and events challenging many of America's constitutional liberties. And, predictably, this sea change is being tested in our nation's schools.

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Unfortunately such displays of "stunning intolerance"[4] are not limited to college graduates. Reports like, *Defending Civilization: How Our Universities Are Failing America, and What Can Be Done About It*, suggest that campus dissent after September 11, 2001 is unpatriotic and lists the names of academics who are allegedly guilty of crimes that support dissent.[5] According to a recent Zogby International poll, 54 percent of Americans favor allowing telephone conversations to be monitored, 80 percent support video surveillance in public places and 67 percent approve of having their mail monitored.[6] And a CNN/USA Today Gallup poll found that a vast majority of Americans said they approve of law enforcement officials, "randomly stopping people who may fit the racial profile of suspected terrorists."[7]

From biometrics to video recognition, America's two-front war against both economic instability and terrorism has the potential to result in an increasingly intolerant society where civil liberties are viewed as roadblocks to the patriotic institutionalization of security standardization. In the name of security advancement, Americans face the potential for a concatenation of defensive errors that may lead to significant declines in civil liberties. And our schools appear to be, once again, the new battleground where those changing social policies are tested.

From the days of *Brown vs. Board of Education*, schooling in America has become the sounding board for a cacophony of social and political agendas. Today, American public education faces a chorus of competitive detractors in addition to cries from corporations and government to reform or be, "taken over".[8] Once on the bandwagon, these reforms with their accompanying *de facto* litigation may actually place students, staff and parents at greater risk. Curiously, educational tort reform is rarely the subject of candidate debates on educational accountability.

Responding to these calls to restructure, the public education community has traditionally established commissions and committees, purchased vendor-developed programs, feebly evaluated their progress, and then braced itself against the next storm of reform. Consistent federal support of public education, kept in place by a duty to transfer democratic principles through schooling, has been applied to a small number of educational programs.[9] Remarkably while federal intrusion into the nation's classrooms has been previously difficult to achieve, under the current Bush administration enhanced political control seems inevitable with initiatives like the reauthorization of the Elementary and Secondary Education Act (ESEA), which, in part, contains mandated provisions from school prayer to the Boy Scouts' use of school facilities.[10]

DECONSTRUCTING SCHOOL SECURITY

Educational communities are harmed when schools are cut adrift amid storms of social change and upheaval. It is a paradox that some of the generation of post World War II baby-boomers, now established policy-makers themselves, view civil liberties as an obstruction to national security. Those who used their campus as a tool of protest during the 1960's and '70's, should be highly critical of the increasing militarization of

schools using sophisticated security technology and enhanced protective services to achieve school safety and behavioral compliance. There exists in public education a serious need for dialogue regarding the deconstruction of school security programs. The current model adopted from the military, law enforcement and the private security industry may not be the best safety solution for educational environments.

Today's students enjoy many 21st century school reform innovations but school discipline still relies upon medieval relics of English common law emphasizing power, retribution and punishment. Whether student discipline was delivered in the past with, "a dunce in the corner," or by its modern equivalent of, "time-out," American school behavioral management systems have remained largely unchanged over time. Surprisingly, the latest in school security technology is not innovative, modern or effective; it's coercive, disciplinary and punitive. Without rigorous inquiry into the behavioral, educational and developmental impacts of security technology on campuses, education officials could implement safety, security and surveillance tactics so intrusive they could arrest the development of those it is designed to protect.

Surveys on the health effects of surveillance monitoring in the workplace have suggested that electronically monitored workers experience higher levels of depression, tension and anxiety and lower levels of productivity than those who are not monitored.[11] Further, there are few credible studies indicating school security technology is actually effective. Many school security practices are based largely on conjecture, vendor recommendation or the threat of litigation rather than scientific evidence that these practices actually deter criminal activity. Proof for the effectiveness of school safety and security measures is rare, ambiguous and often more art than science.[12] Recently, New York *Daily News* reporters tested security measures across their city and, despite a recent double shooting inside a Manhattan high school, found most of the safeguards failed miserably.[13]

While school officials like Principal Brian McKibben from Fremont High School, where 32 surveillance cameras including microphones survey the campus and surrounding area 24 hours a day, may defend ubiquitous surveillance declaring that, "...safety far outweighs other concerns," Fremont student Michael Smith disagrees, "It feels like a jail in here...they might as well just put us in orange jump suits with numbers on them."[14] Significant insight from a youthful representative of a generation where live video cams in the bedroom, survival docudramas, home video shows and hidden camera journalism preempts serious dialogue on the erosion of individual identity within a *Truman Show* and *Jerry Springer Show* culture. The danger is, if students like Michael lose their individual identity, then America runs the risk of losing its national identity.

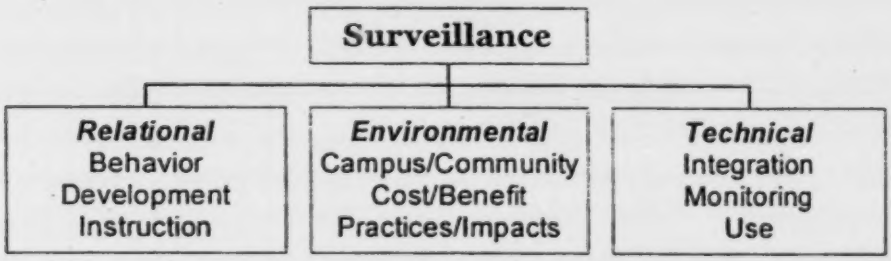
Perhaps Michael should assist school officials with information on criminal displacement and crime reduction studies, one of which finds, "there is no more significant crime reduction than those in control areas without surveillance cameras."[15] Over time and with an increased presence in society, video surveillance systems may actually contribute to criminal activity especially by juveniles who view the technology as an opportunistic mechanism for displaying bravado to friends, family and rivals. Further,

enhanced technical surveillance in the place of traditional supervision may meet the needs of the viewer to watch others in the name of security more than provide additional safety to students and school staff. "Spying on people covertly is an indignity, much like the indignity of harassment itself."[16]

"If we react too quickly to today's challenges, prisons and schools could easily become interchangeable and, in some cases, indiscernible."[17] Michel Foucault warns us about building a "panopticon" of surveillance where power is both, "visible and unverifiable."[18] *The goal of school security is to increase participation, not suspicion.* An effective school security program begins with community-based assessment and planning, uses a wide array of human support systems and seamlessly integrates security technology with other environmental controls.

If participatory instead of exclusionary models are used for school security systems, then any similarity between prisons and schools will be minimized. Parents don't want to send their children to target-hardened fortresses and communities don't want uninviting and inaccessible school facilities resembling penal institutions. Students in these schools would resemble, "butterflies mounted on pins, fastened each to his desk, spreading the useless wings of barren and meaningless knowledge they have acquired."[19] One example of a participatory model for the adoption of a security system may look like this:

Figure 1: **Model for School Security Technology Implementation**



Components within this model support participant dialogue focusing on diverse issues from community to classroom to achieve both user acceptance and technological efficiency.

Since the events of September 11, 2001, other significant social issues have been raised regarding the, "beginnings of a surveillance infrastructure that will erode existing privacy protections".[20] According to the *American* Sentinel, "private sector inventiveness is being wedded to government intrusiveness to reap a disaster for civil liberties." With this "inventiveness," school officials can soon expect to be pressured to implement emerging education security systems technology that may be variations on current national security themes including:

- Interception technology for use with cell phones to email including the FBI's recently renamed "Carnivore" system
- Large-area closed and open circuit PTZ (pan, tilt and zoom) surveillance cameras (CCTV/OCTV) networks with high detail and IR capability
- Identification devices such as biometric scanners and facial recognition technology including those that are lie detectors capable of picking-up flushes around the eyes to determine subject truthfulness
- Surveillance roving wiretaps, anti-hacking and encryption technology
- Tracking devices such as the, "Digital Angel"
- Enhanced crime, cryptology and incident reporting systems
- Intrusive medical and substance abuse tracking technology
- Data retention technology for long-term access to citizen records
- Networked response and web surveillance access systems
- Eavesdropping technology including, "Magic Lantern"
- Enhanced metal detectors and other screening devices
- Mandated "suspicious activity" reports similar to the Postal Service's, "Eagle Eye" program and the IRS's "Know Your Customer" system that monitors bank and purchasing transactions.
- Standardized "smart" identification cards like the "UltraCard," capable of storing 20MB of data and a national driver's licenses linking access to student attendance (including resident and non-resident registration), accountability and behavior.[21]

Variations of these devices and measures applied to campuses may have a positive impact on the safety and security of students and staff and by themselves do not necessarily represent a threat to the educational integrity of school systems. However, their cumulative impacts, without significant educational, developmental and psychological safeguards paralleling their adoption could seriously impair the educational attainment of students and potentially decrease their civil liberties. The purpose of school security is not to treat students with suspicion or obtain criminal evidence but instead, in combination with a variety of other supportive systems, offer students the safety they need to develop and learn.

It is a false dichotomy that decreasing civil liberties gives us more security. Students that are educated and engaged in the application of their civil liberties are key to a sustainable national security when they become adults. Equally important, these systems are designed for use in an adult society, not for a community where nurture, support and youth development are fostered. Adult school staff will inevitably monitor the security technology placed in schools, but many of these individuals lack adequate training and this, combined with the problems of access control for school buildings that were never designed for such controls, add up to increased risks for schools.

Even the nation's airports, before and after September 11th, have their difficulties maintaining a consistent system of security. "The technology is only as good as the people who use it," comments aviation expert Paul Dempsey, professor of law at Denver University."[22] During an assessment of airport access control requirements, the

Federal Aviation Administration (FAA) found from December 1998 through April 1999, that agents successfully penetrated secure areas on 117 (68 percent) of 173 attempts.[23] "We could breech security 80 to 90 percent of the time with very little problem before September 11, said Bogdan Dzakovic, a former FAA agent, "...and today, I don't think we'd have that much more of a problem."[24] In one recent example, the Louisville International Airport had to shut down because a security employee was reported to have fallen asleep.[25]

STUDENT PRIVACY AND SOCIAL JUSTICE

Despite the Fourth and Fourteenth Amendments, there is no unequivocal right to privacy found in the United States Constitution nor is there a independent oversight agency to monitor privacy violations or a comprehensive privacy protection law for the corporate sector. In today's America it seems privacy issues have become a battleground for litigants and a business opportunity for marketers. And when it comes to business opportunity, even organizations like the National School Boards Association are willing to barter student privacy rights for, "productive relationships with business."[26]

With respect to student's rights in school, the current direction of Fourth Amendment law reflects society's fears of and disrespect for children and the paucity of alternatives to police-type enforcement measures that are both in use and under consideration in the schools. It also indicates that school authorities no longer have to grant students the civil rights considered inalienable by the rest of the nation's citizens. Thus, the first line of defense of school administrators is to bring in more policing measures, such as car searches, metal detectors, urinalyses and drug-sniffing dogs.[27]

Historically, the United States Supreme Court has ruled in a number of cases supporting a limited constitutional right to privacy. Specifically, in *Katz v. United States*[28], a person has a right to privacy from government surveillance where there is a, "reasonable expectation of privacy" and in matters of family and education, Americans also have federal protections from violation of their privacy.[29] Federal legislation such as the *Federal Education Records and Privacy Act* (FERPA) requires that any school or institution that receives federal funds for education may not release "non-directory" school records without prior consent. Records may also be protected under *The Privacy Act of 1974*, *The Privacy Protection Act of 1980* and the *Freedom of Information Act*. Additionally, the tort of privacy was first adopted in 1905 and in all but two state courts, recognizes a civil right of action for invasion of privacy.

But what was once a "reasonable expectation of privacy" may have changed dramatically for the nation after September 11, 2001, and for schools since the violence at Columbine. It appears civil liberties have become situational based both on changing current events and when new forms of technology are introduced. With an Orwellian sense of irony, post 9-11 America has become a nation where disclosure is privacy; privacy is disclosure. For example, laws like the Freedom of Information Act, once used to protect individuals from unwarranted intrusions, is now being used by government agencies to shield their activities from public scrutiny in the name of national security.[30]

The passage of recent government legislation affecting both citizen and student civil liberties is second only to the multitude of methods corporations use for monitoring their employees, selling of medical and bank records (tied to social security numbers) and the distribution of surveillance technology for use both in both private and public places like schools. Fortunately for students, personally identifiable information like social security numbers is protected under FERPA.[31] Public schools and colleges are prohibited from requiring their students to disclose their social security numbers unless another federal law requires their collection.[32]

A growing list of government surveillance practices applicable in most cases to students includes the *Omnibus Safe Streets and Crime Control Act of 1968*, the *Electronic Communications Privacy Act of 1986*, the *Foreign Intelligence Surveillance Act of 1978*, the *Communications Assistance to Law Enforcement Act of 1994* and most recently, the *USA Patriot Act*. [33] The USA Patriot Act is particularly important because it, along with its counterpart the *Uniting and Strengthening America Act*, "provides appropriate tools required to intercept and obstruct terrorism."[34]

These *Acts* amend Section 444 (j(1)(A)(B)) of the General Education Provisions Act (20 U.S.C. 1232g) to read in part, (A) "...to collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18 U.S.C., or an act of domestic or international terrorism as defined in section 2331 of that title," and (B) "for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate and use such records."[35] "As social visions of equity and justice cede from public memory, unfettered brutal self interests combine with retrograde social policies to make security a top domestic priority."[36]

Clearly, these *Acts* pose serious dilemmas for educators, but in an era of standards, testing and benchmarks, student privacy and civil liberties seem to be on the bottom of the educational priority list. But what should become clear to educators attempting to develop a sustainable policy response to these statutes is that civil liberties such as privacy are both an educational and social justice issue with no easy answers like, "it's the kid's fault." For example, since the tragedy of Columbine, there has been significant government and vendor interest to develop student predicting and profiling measures to reduce school violence. Predicting student behavior not only raises civil liberties issues but also violates the developmental and psychological health of individual students and may lead to the increased marginalizing of minority students.[37]

EQUITY AND DISPROPORTIONAL DISCIPLINE

The racial profiling of minorities for traffic violations, minority confinement, voting rights[38] and other issues of equity were being addressed in many American communities prior to September 11, 2001. Gary Webb, writing a task force report to the California legislature on racial profiling wrote, "While the CHP (California Highway Patrol) has a strong official policy against racial profiling and unwarranted traffic stops, it appears that

some of these activities were unofficially tolerated and, at lower supervisory levels, even encouraged."[39] The Sentencing Project reports that, "While African Americans constitute 13 percent of all monthly drug users, they represent 35 percent of arrests for drug possession, 55 percent of convictions and 74 percent of prison sentences.[40] And many black parents bear the burden of racial profiling when their children are involved, "It's the fear of black parents across the country; that their sons will be harassed, beaten or killed by police."[41]

Parents of minority students are also concerned with issues of racial disproportionality found in schools. Because educators sometimes fail to understand the institutional linkages that contribute to low academic achievement and higher rates of discipline for minority students, they need an increased awareness of racial discrimination prior to the implementation of security systems. "I don't know why minority students in the district's secondary school were suspended at a higher rate than white students," said Eric Witherspoon, superintendent of Des Moines (Iowa) school district.[42]

A report by the Applied Research Center in Oakland, California, found how high-stakes testing and excessive security measures subvert academic excellence and racial equity for students of color in United States public schools.[43] In June 2000, the Indiana Education Policy Center published a report entitled, "The Color of Discipline," which, in part, concluded that, "these and other data suggest African American students are disciplined more frequently and harshly for less serious, more subjective reasons." And Brenda Townsend commented in her study on the disproportionate discipline of African American learners said, "...to reduce the rates at which African American children are excluded from schools, the relationships among schools, families and communities must be restored.[44]

Unfortunately, the wholesale insertion of school security technology without a rigorous re-examination of school disciplinary practices is unlikely to restore relationships and may, in fact, lead to expanded forms of disproportionate discipline if racial profiling is any indicator. A student learns his place in society and what others expect of him from the way that teachers and administrators conduct the social system of the school."[45] The entire school community is harmed by bias-motivated disciplinary practices.

PRIVACY, PARTICIPATION AND YOUTH DEVELOPMENT

Less than two months before the third anniversary of the Columbine school shootings, deputies rushed to the high school again to quell a food fight that authorities say was a near riot. "They are way over the top on security," said Austin Rabinoff, 15, a sophomore. "They check the parking lot all the time. When they found a baseball bat in my car they threatened me with six months jail time and a $1,500 fine," said Junior Keith Kinsella. Kinsella said school officials have been too zealous about avoiding any violence because of the April 20, 1999, assault that left 12 students, one teacher and two teen gunmen dead.[46] Certainly, it is difficult to be critical of Columbine school officials after the events of their tragedy. But this recent report may underscore the importance of minimizing the stress of invasive surveillance and its requisite invasion of

student privacy in the process of developing a safe school. Privacy is viewed in most democratic societies as a necessary element in the development of healthy, active individuals.[47]

Autonomous youth development of which civil liberties like privacy play a part can be one strategy to reduce draconian school violence suppression tactics. "Today, supporting environments are denied to large numbers of children and youth and in many instances the environments in which they live have actually become dangerous," suggests Joel F. Handler, chair of the panel for a National Research Council report entitled, *Losing Generations: Adolescents in High Risk Settings*. The NRC panel found significant links between the influence of environmental settings and adolescent behavior and development.[48] Safe and supportive environments are critical for a child to develop positive relationships and maturation. "Privacy is necessary...to protect important social relationships...but there is also an important case for privacy that has to do with the development of human individuality. Without privacy there is no individuality."[49]

Educators should, when developing a school security program, avoid instilling more fear and mistrust in students by implementing policies, procedures and practices that are excessively oppressive, demeaning or intrusive. This means creating security programs for the right reason: *to enhance safety, quality of instruction and youth development.* Security program managers working in educational institutions sometimes fail to fully understand that security technology is not as an end to itself, but a means to enhance the development, attendance and achievement of children. Failure, "to provide students with meaningful social contexts within which to function have precipitated the participation of the school in violence problems."[50]

Children and youth are developmental human beings and education is central to their development. According one child development expert, Lev Vygotsky, "the only good learning is that which is in advance of the child's development."[51] There exists an intimate relationship between education and a healthy child's development. If youth development programs are missing in schools, learning becomes difficult and behavioral difficulties follow. When school officials encourage participatory civil liberties like privacy, students learn the capacity to be self-correcting. For example in Vygotsky's work, private speech serves an important self-regulatory function. It is the means by which children guide their own thinking and behavior. Private speech guides children from being regulated by others to being self-regulated by their own thinking.[52]

For children and youth, if there is limited participation, there is inhibited social development. Studies demonstrate the lack of participation is associated with rigid and simplistic relational strategies, psychological dependence on external sources for personal validation and the expression of self-destructive and antisocial behaviors including drug abuse, depression, promiscuity, premature parenthood, suicide and delinquency."[53]

For example, one developmental theory that identifies delinquency as a critical pathway toward criminality is Robert Loeber's work on antisocial conduct. Loeber and his colleagues used a developmental model to describe how children progress from disruptive to criminal behaviors. According to these researchers, some children follow specific developmental pathways that lead to increasingly disruptive and delinquent behavior. Especially in boys, these behaviors are displayed in a methodical, progressive manner with less serious problem behaviors preceding more serious ones.[54]

Loeber found that these increasingly disruptive and antisocial behaviors in childhood and adolescence roughly follow a sequence of progressive activity from difficult temperament to criminal recidivism:

- Difficult temperament
- Hyperactivity
- Overt conduct problems and/or aggressiveness
- Withdrawal
- Poor peer relationships
- Academic problems
- Covert or concealing conduct problems
- Association with deviant peers
- Delinquency and arrest
- Recidivism[55]

Loeber's theory was field-tested beginning in 1986 with a longitudinal investigation in Pittsburgh, involving repeated contacts with the same male juveniles and their primary caretakers over a substantial portion of their developmental years.[56] This research inquiry, later known as the *Pittsburgh Youth Study*, confirmed that for the males studied, less serious forms of delinquency developed into distinct behavioral pathways that often steered individuals toward more serious criminal activity.

The *Pittsburgh Youth Study* also found that boys who never progressed beyond the first stage of any pathway reported very low offense rates during the prime delinquency ages of 13 to 16. However, as soon as boys started to develop their disruptive and delinquent behavior characteristics along several diverse pathways, the rate of serious offenses increased.[57] Loeber's work helps establish the link that unless children and adolescents have opportunities for meaningful participation, supportive environments and positive adult mentors, the developmental pathways youth choose can be dangerous both to themselves and others.

LEGAL CHALLENGES AND EDUCATIONAL JUSTICE

As public education evolves, so does school law. Matters of privacy, equity and security compete with a variety of other compelling issues the school community confronts daily. Schools are dynamic organizations propelled by a mission to serve a vast array of educational and social needs and must look constantly for new ways to be more efficient and responsive.

Both the Congress and Supreme Court have recently addressed a number of issues regarding the privacy of students.[58] Other legal trends and issues will become equally compelling for school officials to consider in the near future. These include bullying, educational records, harassment, standards of liability, alternative and off-site learning programs, student searches and discipline. Discipline, in particular, for regular and special education students is notable.

For example, a 10-inch bread knife found by a school security guard in the bed of a student's pickup truck was accidentally left behind over the weekend from a box of personal belongings owned by his ailing grandmother. The knife could end up costing the 16-year-old honor student the rest of his junior year of high school. He was expelled under his state's zero–tolerance weapons policy.

Students like this share a fate similar to others recently punished for handing out mints to classmates, possessing a nail clipper, taking a plastic ax to a class Halloween party and a 8-year-old boy pointing a breaded chicken finger at a teacher and saying, "Pow, pow, pow." Last year the American Bar Association voted to recommend ending the zero-tolerance policies, saying they are unfair and inappropriate for many children.[59] Unfortunately, given the continued application of these policies in many schools, there also seems to be zero tolerance for common sense.

Recognizing that practices like zero tolerance can lead to absurdity and discrimination, the Governing Board and superintendent of the Vallejo City Unified School District in California, began an initiative to reduce, not increase the number of student suspensions and expulsions. This initiative, Educational Justice for African American Students (EJAAS), relies on student advocacy, community service and educational justice to reduce the number of minority student school exclusions.[60] California requires that school districts apply, "corrective actions" prior to suspension or expulsion in an effort to reduce the overall number of school exclusions.[61] These "corrective actions" offer school officials statutory alternatives that encourage options for school exclusions.

Educational justice programs can offer students and parents a variety of options for corrective action prior to discipline. Clearly, assessing school staff and student relationships, peer interaction, curriculum and instruction and the school's ecology can have a dramatic impact on student behavior. But for students who require formal behavioral intervention, school officials should consider programs like restorative justice that offer modern alternatives to punishment and discipline. School systems today need programs that balance the varied interests of students, peers, the school and the community. Restorative justice offers this balanced approach to student management programs.

Currently, many restorative justice activities are done by social services agencies, schools, law enforcement and probation departments.[62] Restorative justice is, "a process whereby parties with a stake in the particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the

future."[63] Mika and Zehr developed a series of restorative justice "signposts" applicable to the school community:

- Focus on harms suffered rather than laws or policies broken
- Show a balanced concern for the victim and offender by involving both in the justice process
- Work toward restoration of victims through empowerment and response to their needs
- Support the offender and simultaneously encourage understanding, acceptance and commitment to repair the harm
- Recognize the offender's needs to fulfill obligations which are achievable, not punitive
- Provide opportunities for direct and indirect victim-offender dialogue
- Involve and empower the community through the judicial process, particularly by increasing its capacity to recognize and respond to infractions of law or policy
- Encourage collaboration and reintegration rather than coercion and separation
- Pay attention to the unintended results of alternative activities and programs
- Show respect for the dignity of everyone, particularly victims, offenders and those who are concerned with justice.[64]

CONCLUSION

School communities are complex social settings requiring modern methods of management and response to risk. While many pundits lead us to believe it's effective to buy our way out of trouble using security technology, achieving safe schools over the long-term requires investment not in hardware but in the software of relationships, resiliency, educational justice and youth development. For example, the risk pathways brought to Columbine High School by students Harris and Klebold included personal struggles to maintain relationships, lack of adult interaction and emotional isolation. The cumulative effect of these unaddressed risks resulted in a violent message of contempt delivered to both the school and community.

Violent acts perpetrated by children are the result of stress response mechanisms that can be mitigated by nurturing the resilient qualities of attachment, problem solving, spirituality, interaction, age appropriate independence, support, goal orientation, thriving, and positive adaptation. Models for delivering these qualities include Haggerty's descriptions of multi-axial life trajectory and developmental cascades and Garmezy and Rutter's developmental interventions described in their book, *Stress, Coping and Development in Childhood*.[65] Programs like these and others including restorative justice consider youth developing responses then collaboratively provides intervention and opportunity, increasing the protective factors necessary to support the child in the future.

Effective institutional approaches to reduce violence consist of non-intrusive individual and social management techniques including risk assessment and intervention, information sharing, safety planning and educational justice. Lore and Schultz comment, "Parallel studies of aggression in children, assaultive adults and even entire societies have suggested that humans are exquisitely sensitive to subtle social controls that could be used to reduce the frequency of individual acts of violence."[66] Enhancing safety also requires that school officials discover ways to increase the protective factors found in the family, school and community.

An important protective factor for students would be the expansion their nexus of social attachment through the awareness and application of their civil liberties during maturation. Developing behavioral scaffolding systems of support emphasizing connectedness, diversity and tolerance may counteract the potentially violent effects of marginalization. An architecture of attachment built upon a foundation of participation using developmental scaffolds that identify strengths, emphasize contribution and enhance civil liberties can increase school safety and prevent tragedy.

It has been estimated Americans are being photographed an average of 30 times each day...on a single day in New York a researcher counted 2,400 surveillance cameras.[67] Clearly, too few adults question the psychological impact that increasingly sophisticated security systems have on individuals perhaps because surveillance may have already become an unquestioned community standard. In our demographically aging society, many of the distinctions that have traditionally separated adults and children are blurred, so the developmental impacts of intrusive technology on children by adults may not be fully appreciated. Too many children act like adults and too many adults act like children. This is why, in reaction to the events of Columbine and September 11th, educators should not act in ways that fundamentally change what American public schooling has become over time. School officials should focus their pedagogical energies on protection over risk.

Collectively, students, parents, school staff and the community must find ways where reactions to national events do not give victory to terrorism. Americans must not alter the legacy of freedom its citizens have traditionally called upon the schools to deliver. There is a greater need today for dialog and human connection than for technology.

Teachers who encourage age-appropriate discussion on the domestic and international wells of discontent that breed terrorism will do more for national security than hundreds of metal detectors. "Clearly, against the backdrop of fear and uncertainty we must re-evaluate our policies regarding surveillance..."[68] At the end of the day, long-term sustainable security will only come when we have enhanced social justice for all our students, their families, our communities, our nation and our world.

Perhaps the real danger is that educational institutions, rushing to embrace bigger and better security systems, will forget that human relationships, not technology, form the basis of authentic security. But because relationships take time to develop and nurture, fear and expedience may have contributed to an American spending binge similar to

military expenditures during the Cold War. The major difference is that this time, we may be protecting us from ourselves.[69]

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[1] Timothy Egan, "In Sacramento, a Publisher's Questions Draw the Wrath of the Crowd," *The New York Times*, 12/21/01.
[2] CSUS Common Data Set – 2000, Degrees conferred, IPEDS Completions, Part A.
[3] See Robert O'Harrow Jr., "Marketers May Face Student-Data Curbs," *The Washington Post*, 12/18/01.
[4] Robin Wilson and Ana Marie Cox, "Terrorist Attacks Put Academic Freedom to the Test," *The Chronicle of Higher Education*, 10/5/01, pg. A12.
[5] Henry A. Giroux, "Democracy, Freedom, and Justice after September 11th: Rethinking the Role of Educators and the Politics of Schooling," *Teachers College Record*, #10871, 1/16/02
[6] John Rossomando, "Most Americans Support Government Surveillance," *CNSNews*, 2/7/02.
[7] Liz Dagget, "Poll shows many Americans now approve of racial profiling," *The Daily Helmsman Online, 11/29/01*
[8] Johnson, Robert, C., "Legislature Signals Probable Takeover of Philadelphia Schools," *Education Week*, October 31, 2001.
[9] FERPA, IDEA, 504, Title 1, 9, etc., come to mind.
[10] "ESEA Extends Federal Reach in Schools," *NEA Today*, Washington, DC, March 2002, pg. 20.
[11] Rosen, Jeffrey, *The Unwanted Gaze: The Destruction of Privacy in America*, Vintage Books, New York, 2001, pg. 213.
[12] Garrison, Ronald, W., *Avila v. Houston Independent School District*, United States District Court for the Southern District of Texas, H-00-2794, 2001.
[13] Gendar, Allison, Nichole Bode, Elizabeth Hays and Jonathan Lemire, "Failing Grade for School Security", *New York Daily News*, January, 27, 2002.
[14] Katz, Alex, "Spy Cameras Watch over Fremont High," *Oakland Tribune*, 2/7/02.
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[16] Rosen, Jeffrey, *The Unwanted Gaze: The Destruction of Privacy in America*, Vintage Books, New York, pg. 214.
[17] Graves, Ben, E., *Beware of Treating Schools Like Prisons*, AS&U, April 1994, pg. 22.
[18] Foucault, Michel, *Discipline and Punishment: The Birth of the Prison*, Vintage Books, New York, pg. 201.
[19] Montessori, Maria, *Spontaneous Activity in Education*, Robert Bentley, Inc., Cambridge, MA, 1964.
[20] As reported in the *Contra Costa Times*, from a Robert O'Harrow Jr. *Washington Post* article entitled, "Air Profiling Network Raises Privacy Issues," 2/1/02, pg. B3.
[21] Several states currently link school attendance with obtaining a driver's license. Federal efforts in this area include reducing or eliminating welfare to the families of drug users and a current California legislative proposal would deny a driver's license to males who fail to register for the draft (see *Contra Costa Times*, "Draft Registry Splits Students," 3/15/02, pg. A3.
[22] Konrad, Rachel, "Airport Security Technology Under Scrutiny," CNET News.com, 9/13/01.
[23] Memo from Alexis M. Stefani, Assistant Inspector General for Auditing to the Federal Aviation Administration on Airport Access Control, 11/18/1999, Report No. AV-20000-017.
[24] Reported on CBSNews.com in an article entitled, "Fear of Flying," Washington, DC, 2/25/02.
[25] USA Today, "Napping Security Worker Delays Flights in Louisville, " 2/19/2002.
[26] O'Harrow, Robert, "Marketers May Face Student Data Curbs," *Washington Post*, 12/18/02.
[27] Beyer, Dorianne, Esq., "School Safety and the Legal Rights of Students," *ERIC Clearinghouse on Urban Education*, No. 121, May 1997, EDO-UD-97-2.
[28] 386 US 954, (1967)
[29] See Griswold v. Connecticut, 381 US 479 (1965); Whalen v. Roe, 429 US 589 (1977); Paul v. Davis 424 US 714 (1976).
[30] Martin E. Halstuk, "The Treat to Freedom of Information," *Columbia Journalism Review*, Nov/Dec. 2001.

[31] Family Educational Right to Privacy Act (Buckley Amendment), 20 USC S. 1232g.
[32] *Privacy Act of 1974*, (5 U.S.C. § 552a)
[33] This *Act* amends 20 USC 1232g, § 507-508 (FERPA and the *National Education Statistics Act of 1994*).
[34] Public Law 107-56, October 26, 2001;115 Stat.272.
[35] FERPA, Sec. 507 [115 Stat. 367-68] and § 444 of 20 U.S.C. – 1232(g) by adding after subsection (i) a new subsection (j) 1 (A) (B).
[36] Henry A. Giroux, "Democracy, Freedom, and Justice after September 11th: Rethinking the Role of Educators and the Politics of Schooling," *Teachers College Record*, #10871, 1/16/02.
[37] In August 2000, the U.S. Secret Service released a report on school violence critical of predicting and profiling. Bryan Vossekuil, the agent heading the project, said, "There's no one set of characteristics that describe a school shooter - we don't believe in profiles." Additionally:

- Behind most recent efforts to predict youth behavior is the politically motivated assumption that society must treat young offenders as adults. One way to achieve this goal is to intervene in the rights of others who, by their status in society, have fewer rights guaranteed by the Constitution. Simply put, it's easier to pick on kids. "Police are more likely to arrest youth than adults who are marginally involved in criminal behavior." (R.J. Gable in *Today's Delinquent*, Vol. 1, 1982.)
- Curiously, the American juvenile justice system and OJJDP were created specifically to counter practices that treated juveniles as adults. Behavioral prophecy will return childhood to the dark ages.
- Equally curious are the marketable reasons behind the current interest in predicting juvenile behavior: labeling and social control. Managing predicted behaviors would certainly increase the demand for Ritalin, Prozac and Zoloft. Prediction will lead to prescription.
- Current behavioral predicting and profiling attempts are more art than science. Enforcement agencies find it difficult to profile most adult offenders both for reasons of accuracy and Constitutional protections. This is why infiltration and surveillance are the preferred methods of criminal intervention.
- Studies on resilience demonstrate that the vast majority of youth who experience multiple risk factors during their childhood do not grow-up to be criminal, deviant or violent (Werner, Bernard, et. al).
- Since only a small number of chronic juvenile offenders commit the majority of criminal offenses, why fixate on predicting the behavior of all children? Do we need more identifying "labels" for children?
- Rather than attempt to predict an individual child's behavior, why not modify children's institutions to provide programs emphasizing support, safety, social justice, health and inclusion?
- Predicting juvenile behavior is, "like predicting a major earthquake, there are too many variables." (John H. Laub, Professor of Criminology, University of Maryland in College Park.)
- Recent challenges to racial profiling and disproportionate rates of disciplinary actions against minorities make predicting and profiling socially suspect. Predicting behavioral characteristics can be linked historically to outcomes like: phrenology, stereotyping, racism and ethnic cleansing.
- The author of a longitudinal birth cohort study conducted in Wisconsin during the 1940's and 50's concluded that, "The future behavior of individual juvenile offenders cannot be accurately predicted regardless of their early criminal records." (Shannon, L.W., Risk Assessment, *Journal of Quantitative Criminology*, Vol. 1 #2, 1985.)
- Researcher Hopson declared, "The literature presents too many false positives and false negatives to provide any support for predictors of violent juvenile behavior." (Hopson, D., *Prediction of Juvenile Violence*, 1987.)
- Hamparian, found in 1987 that, "Few data suggest an ability to accurately predict individual violent juvenile behavior."
- The conclusion of a study completed in 1999 sponsored by the National Research Council and the Institute of Medicine stated, "Physicians cannot reliably identify children who go on to commit random, uncharacteristic acts of violence, such as the recent school shootings...but that doesn't necessarily hold true for a subset of children who exhibit consistently aggressive behavior starting in toddler-hood...it turns out that these children often have multiple comorbid psychiatric illness."

(Clinical Psychiatry News,27(7):5,1,1999). Treating illness is different from punitive action based on probability.

[38] An example of voting rights issues was recently described by Michael Moore, "...this assault on voting rights of minorities was so widespread in Florida that it even affected people like Linda Howell. Linda received a letter informing her that she was a felon and therefore advising her not to bother showing up on Election Day, because she would be barred from voting. The only problem was, Linda Howell wasn't a felon; in fact, she was the elections supervisor of Madison County, Florida. She and other local election officials tried to get the state to rectify the problem, but their pleas fell on deaf ears. They were told that everyone who complained about being prevented from voting should submit themselves for fingerprinting, and then let the state determine whether or not they were felons". Reported in *Stupid White Men*. By Michael Moore, Regan Books/Harper-Collins, New York, 2001, pp.5-6.

[39] Webb, Gary, "Task Force Report on Government Oversight for Operation Pipeline," California Legislative Reports, 10/29/99.

[40] Sentencing Project Report, "Young Black Americans and the Criminal Justice System: Five Years Later," The Sentencing Project, Washington DC, April 2001.

[41] Cottman, Michael H., and Avis Thomas-Lester, "Racial Profiling Worries Parents," *The Washington Post*, 12/8/2000, pg. A1.

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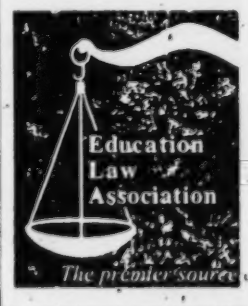

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